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1 (Jury out)

2 THE COURT CLERK: All rise.

3 THE COURT: Good morning, everyone.

4 Okay. Are we ready?

5 MR. ROSENTHAL: Yes, Your Honor.

6 MR. MINO: Yes.

7 THE COURT: All right. Good.

8 THE COURT CLERK: All rise.

9 (The jury enters)

10 THE COURT: Good morning, everyone.

11 THE JURY: Good morning.

12 THE COURT: Okay. So you have your Hobby's lunch  
13 order in, I take it?

14 Everyone can be seated.

15 It's the best place to eat in Newark, so I hope  
16 you enjoy it, and I hope you ordered something that you  
17 like. All the food there is very good.

18 Okay. So we're here for the final instructions.

19 Ladies and gentlemen:

20 Now that you have heard all of the evidence to be  
21 received in this trial, I will now give you the final  
22 instructions of the Court as to the law that is applicable  
23 to this case and which will guide you in your decisions.

24 All of the instructions of law given to you by the  
25 Court - those given to you at the beginning of the trial,

1       those given to you during the trial, and these final  
2       instructions - must guide and govern your deliberations.

3               It is your duty as jurors to follow the law as  
4       stated in all of the instructions of the Court and to apply  
5       those rules of law to the facts as you find them from the  
6       evidence received during the trial.

7               Counsel may refer to some of the applicable rules  
8       of law in their closing arguments to you. If, however, any  
9       difference appears to you between the law as stated by  
10      counsel and that as stated by the Court, you, of course, are  
11      to be governed by the instructions given to you by the  
12      Court.

13              You are not to single out any one instruction  
14      alone as stating the law, but must consider the instructions  
15      as a whole in reaching your decisions.

16              You should not be concerned with the wisdom of any  
17      rule of law stated by the Court. Regardless of any opinion  
18      you may have as to what the law ought to be, it would be a  
19      violation of your sworn duty to base any part of your  
20      verdict upon any view or opinion of the law other than that  
21      given in these instructions of the Court, just as it would  
22      be a violation of your sworn duty, as the judges of the  
23      facts, to base your verdict upon anything but the evidence  
24      received in this case.

25              In deciding the issues presented to you for

1 decision in this trial, you must not be persuaded by bias,  
2 prejudice, or sympathy for or against any of the parties to  
3 this case, or by any public opinion.

4 Justice through trial by jury depends on the  
5 willingness of each individual juror to seek the truth from  
6 the same evidence presented to all of the jurors here in the  
7 courtroom and to arrive at a verdict by applying the same  
8 rules of law as now being given to each of you in these  
9 instructions.

10 In a trial of this kind, the attorneys, the judge,  
11 and you, the jury, have separate duties. The primary  
12 function of the attorneys is to present the evidence and to  
13 argue their contentions; that is, what they contend the  
14 evidence does or does not prove.

15 The Court has the responsibility of safeguarding  
16 the rights of the parties and deciding the legal issues in  
17 the case. It is the function of the Court, as you have  
18 observed, to preside over the trial and to see that it is  
19 conducted in accordance with the established rules and  
20 principles of law. Furthermore, it is for the Court to make  
21 decisions on questions of law that are presented from time  
22 to time during and at the conclusion of the case. Finally,  
23 it is the Court's function to instruct you on the  
24 substantive law that applies to this case.

25 If during the course of this trial I asked a

1 question of a witness, it was solely for the purpose of  
2 making clear whatever the testimony was from a witness or  
3 perhaps clarifying a question for the witness' benefit. You  
4 are not to infer from the fact that I asked a question here  
5 and there that I hold any opinion whatsoever regarding the  
6 result of the trial; I do not. Nor should you consider it  
7 any more or less important because a question happened to be  
8 asked by me rather than somebody else.

9 It is your function as jurors to determine the  
10 facts, and this, of course, should be done solely from a  
11 fair consideration of all the evidence in the case. It is  
12 your recollection of the evidence that you have heard that  
13 controls your deliberations. The evidence should be  
14 considered and viewed by you as jurors in light of your own  
15 observations and experience in the affairs of life; that is,  
16 by using your own good common sense. You are to perform  
17 this duty without sympathy, bias, or prejudice. Thus, as  
18 judges of the facts, you, the jury, are to carefully and  
19 impartially consider all the evidence, follow the law as I  
20 state it to you, and reach a just verdict. The Plaintiff  
21 and the Defendant expect this of you, and they are entitled  
22 to nothing less.

23 During the trial, counsel for the parties have  
24 made arguments and statements before you. Similarly,  
25 counsel will make arguments during their closing arguments.

1       When attorneys do this, they are acting well within their  
2       rights and indeed their obligations to represent their  
3       clients. Statements of counsel are for the purpose of  
4       attempting to persuade you as to their view of what the  
5       evidence has shown, or failed to show, and accordingly  
6       should be regarded as arguments, but not as evidence. No  
7       statement, opinion, unanswered question, or argument by a  
8       lawyer in this case is to be considered as evidence by you.  
9       Again, the only evidence that you may consider is that which  
10      you have seen and heard by way of the sworn testimony of  
11      witnesses, documents and other exhibits that were received  
12      into evidence and which you will be given an opportunity to  
13      review during your deliberations.

14               I further instruct you that if during the course  
15      of this trial, in opening statements, closing statements, or  
16      at any time any of the attorneys here has put forth a  
17      version of the facts that does not square with your own  
18      recollection, you are to disregard counsel's version in  
19      favor of your own recollection. The attorneys function as  
20      advocates representing their clients, the clients before  
21      you, whether it's the Plaintiff, Steven Foder, or the  
22      Defendant, the PATH. Your decision in this case is to be  
23      based solely on the evidence as you found it, assessed  
24      against the principles of law governing the charges as I  
25      instruct you.

1           You are to draw no inferences from any objections  
2       made by counsel or from my rulings on those objections. On  
3       some occasions during the trial, I struck certain evidence  
4       or remarks from the record and instructed you to disregard  
5       them. You must adhere to those instructions and disregard  
6       any such item. Just as you are not to draw any inferences  
7       from or speculate about objections made by counsel to  
8       testimony or exhibits offered by the other side, you should  
9       not speculate as to why objections were not made in certain  
10      instances or why an attorney may object to some items of  
11      evidence but not to others that you might consider similar.  
12      Pay no attention to that, even if you happen to observe it.  
13      Your focus should be on the evidence that has been presented  
14      for your consideration, not whether it came before you with  
15      or without objection from any party.

16           From time to time, counsel and I conferred at the  
17      sidebar of the Court in the corner of the courtroom. These  
18      conferences between the Court and counsel concern legal  
19      questions upon which I have ruled. All of these conferences  
20      or arguments pertained solely to legal phases of the case  
21      and do not concern your function as jurors. More  
22      particularly, you should not speculate on the matters that  
23      we may have been discussing or allow that speculation to  
24      intrude into your deliberations in any way.

25           There is nothing particularly different in the way



1       that a juror should consider the evidence in a trial from  
2       that in which any reasonable and careful person would treat  
3       any very important question that must be resolved by  
4       examining facts, opinions and evidence. You are expected to  
5       use your good sense in considering and evaluating the  
6       evidence in this case for only those purposes for which it  
7       has been received.

8               Keep constantly in mind that it would be a  
9       violation of your sworn duty to base a verdict upon anything  
10      other than the evidence received in the case and the  
11      instructions of the Court.

12             The evidence in this case consists of the sworn  
13      testimony of the witnesses, all exhibits received into  
14      evidence, regardless of who produced them, and all the facts  
15      which may have been agreed or stipulated.

16             Evidence should not be considered in bits and  
17      pieces, as though each fact or circumstance stood apart from  
18      others. Rather, you should consider all of the evidence  
19      presented, whether or not I have referred to it or whether  
20      or not counsel has referred to it, and draw such inferences  
21      as reason and common sense lead you to draw.

22             It makes no difference whether the evidence was  
23      offered by the Plaintiff or by the Defendant. It was all  
24      evidence, and you should consider it to the extent that it  
25      helps you decide the issues. If I have made references to

1 the evidence in the course of these instructions that does  
2 not coincide with your own, please disregard my references.  
3 You are to determine the facts on the basis of all of the  
4 evidence.

5 Certain things are not evidence and you may not  
6 consider them in deciding the facts of the case. I will  
7 list them for you.

8 One, arguments and statements by lawyers are not  
9 evidence. The lawyers are not witnesses. What they have  
10 said in their opening statements, closing arguments, and at  
11 any other time is intended to help you interpret the  
12 evidence, but does not constitute evidence. If the facts as  
13 you remember them differ from the way a lawyer has stated  
14 it, your memory of the facts controls.

15 Two, questions and objections by lawyers are not  
16 evidence. Attorneys have a duty to object when they believe  
17 a question is improper under the Rules of Evidence. You  
18 should not be influenced by the objection or the Court's  
19 ruling on it.

20 Three, testimony that has been excluded or  
21 stricken or that I have instructed you to disregard is not  
22 evidence and must not be considered. In addition, if  
23 testimony or exhibits have been received for a limited  
24 purpose, you must follow the limiting instruction as I have  
25 given you.

1                   Four, anything you may have heard or seen when  
2                   court was not in session is not evidence. You must decide  
3                   the case solely based on the evidence received at trial.

4                   There are, generally speaking, two types of  
5                   evidence upon which you may find the truth as to the facts  
6                   of this case, "direct" evidence and "circumstantial." One  
7                   type is direct evidence, such as recordings or the testimony  
8                   of eyewitnesses who testified as to what he or she has  
9                   heard, or what that person knows based on his or her  
10                  knowledge by virtue of that person's senses. The other type  
11                  is circumstantial evidence, which is evidence that tends to  
12                  prove a disputed fact by proof of other facts. Stated more  
13                  simply, circumstantial evidence describes evidence of  
14                  surrounding circumstances from which a jury might conclude  
15                  that an event has taken place.

16                  Let me give you an example between direct and  
17                  circumstantial evidence.

18                  For example, assume you are walking along a  
19                  sidewalk when you hear the squeal of tires on the roadway  
20                  behind you. You turn around and notice fresh skid marks  
21                  behind a car which is stopped near you. Even though you did  
22                  not see the car, you may properly conclude from the  
23                  surrounding circumstances, such as the squeal of the tires  
24                  and the skid marks, that the car has just skidded to a stop.

25                  Circumstantial evidence is of no less value than

1 direct evidence. Thus, no greater degree of certainty is  
2 required of circumstantial evidence as opposed to direct  
3 evidence. The law makes no distinction between direct and  
4 circumstantial evidence.

5 In considering evidence, you are not limited to  
6 the bald statements of witnesses or the bald appearance of a  
7 particular exhibit. On the contrary, you are permitted to  
8 draw from the facts that you find to have been proved such  
9 reasonable inferences as seem justified to you in light of  
10 your own experience and common sense. In other words, you  
11 are to use your own good common sense in determining what  
12 inferences, if any, are to be drawn from such facts as you,  
13 the jurors, find to be proven.

14 What is an inference? An inference is basically a  
15 deduction or a conclusion that reason and common sense lead  
16 you to draw from the evidence.

17 As I have noted, you are the sole judges of the  
18 issues of fact. You are likewise the sole judges of the  
19 credibility, that is, the believability of all witnesses who  
20 testified at the trial as well as the weight to be given to  
21 the testimony of any witnesses you have heard. It is not  
22 for you to determine how much testimony -- I'm sorry.  
23 Strike that. It is for you to determine how much of the  
24 testimony is believable and how much is not. Where one  
25 witness testified to a fact and another unequivocally denies

1       it, examine the testimony of both persons in the light of  
2       all the circumstances under which the testimony was given.  
3       Seek out the motive or motives which may have prompted the  
4       witness to testify the way he or she did. In other words,  
5       ask yourself, "Did the witness have cause to lie?"

6               In your determination of whether the testimony of  
7       any one or more witnesses who testified is credible in whole  
8       or in part, you have the right to take into consideration  
9       the circumstances under which he or she testified; the  
10      relationship, if any, to a party; the intelligence, or lack  
11      of intelligence of the witness; the demeanor of the witness  
12      on the stand; the candor and sincerity or lack of it  
13      indicated by the manner in which the testimony was given;  
14      and the interest or lack of interest of a witness in the  
15      outcome. Consider, too, the knowledge or lack of knowledge  
16      which a witness might have concerning the facts about which  
17      he or she testifies. Inconsistencies or discrepancies in  
18      the testimony of a witness and between the testimony of  
19      different witnesses may or may not cause the jury to  
20      discredit any such testimony. An innocent misrecollection,  
21      like a failure to recollect, is not an uncommon experience.  
22      In weighing the effect of a discrepancy, consider whether it  
23      pertains to a matter of importance or a non-important  
24      detail, or whether the discrepancy resulted from innocent  
25      error or willful falsehood.

1           You may also consider in evaluating the  
2           credibility of any witness' testimony and the weight to be  
3           given to it the extent to which his or her testimony is  
4           contradicted or corroborated by other testimony or  
5           documentary evidence. You may, after such an appraisal of  
6           testimony of a witness and in the exercise of your sound,  
7           conscientious discretion, believe or disbelieve the  
8           testimony of any witness either in whole or in part.

9           A witness may be discredited or impeached by  
10          contradictory evidence; or by evidence that at some other  
11          time, the witness has said or done something, or has failed  
12          to do or say something, which is inconsistent with the  
13          witness' present testimony.

14          If you believe any witness has been impeached and  
15          thus discredited, it is your exclusive province to give the  
16          testimony of that witness such credibility, if any, as you  
17          think it deserves.

18          Your decision on the facts of this case should not  
19          be determined by the number of witnesses testifying against  
20          a party. You should consider all the facts and  
21          circumstances in evidence to determine which of the  
22          witnesses to believe.

23          The testimony of a single witness which produces  
24          in your mind a belief in the likelihood of the truth of any  
25          fact is sufficient for the proof of that fact.

1           It is your exclusive function to determine the  
2       persuasive value or weight that you will attribute to the  
3       testimony of all witnesses whom you have heard testify.  
4       Each of you is a judge in this case. Collectively, you are  
5       the sole judges of the facts.

6           The parties have stipulated that certain facts are  
7       true, and those stipulations have been read to you during  
8       this trial. You must therefore treat these facts as having  
9       been proven for the purposes of this case.

10          During the trial, certain testimony has been  
11       presented to you by way of video deposition. The deposition  
12       consists of sworn, recorded answers to questions asked of  
13       the witness in advance of the trial by attorneys for the  
14       parties to the case. The testimony of a witness who, for  
15       some reason, is not present to testify from the witness  
16       stand may be presented by a videotape. Such testimony is  
17       entitled to the same consideration and is to be judged as to  
18       the credibility and weighed and otherwise considered by you,  
19       insofar as possible, in the same way as if the witness had  
20       been present and had testified from the witness stand.

21          Plaintiff Steven Foder has the burden of proving  
22       his case by what is called the preponderance of the  
23       evidence. That means Mr. Foder has to prove to you, in  
24       light of all the evidence, that what he claims is more  
25       likely so than not so. To say it differently: If you were

1 to put the evidence favorable to Mr. Foder and the evidence  
2 favorable to PATH on opposite sides of the scales, Mr. Foder  
3 would have to make the scales tip somewhat on his side. If  
4 Mr. Foder fails to meet this burden, you must find for the  
5 PATH on that issue.

6 On other issues, called defenses, PATH has the  
7 burden of proving the elements of the defense by a  
8 preponderance of the evidence. I will instruct you on the  
9 facts that will be necessary for you to find on this  
10 defense. A defense is proven if you find, after considering  
11 all the evidence in the case, that the Defendant has  
12 succeeded in proving that the required facts are more likely  
13 so than not so.

14 In determining whether any fact has been proved by  
15 a preponderance of the evidence in this case, you may,  
16 unless otherwise instructed, consider the testimony of all  
17 witnesses, regardless of who has called them, and all  
18 exhibits in evidence, regardless of who may have produced  
19 them.

20 When I say in these instructions that a party has  
21 the burden of proof of any proposition, or when I use the  
22 expression "if you find, or "if you decide," I mean you must  
23 be persuaded, considering all the evidence in the case, that  
24 the proposition is more probably true than not true.

25 Okay. Let's talk about the claims in this



1 lawsuit.

2 Plaintiff Steven Foder's claim is based on the  
3 Federal Employers' Liability Act, known as FELA. This is a  
4 Federal statute that requires railroads, such as Defendant  
5 Port Authority Trans Hudson Corp., or the PATH, to exercise  
6 reasonable care to provide a reasonably safe workplace for  
7 its employees.

8 I will now briefly explain Mr. Foder's claim and  
9 PATH's defenses to that claim. I will then explain in more  
10 detail certain legal terms that apply to their claims.

11 First, Mr. Foder's claim. Mr. Foder claims that  
12 while he was employed by PATH, he suffered an injury that  
13 was caused by PATH's negligence. Mr. Foder claims that PATH  
14 should be required to pay damages because its negligence was  
15 a cause of injury to Mr. Foder. Mr. Foder has the burden of  
16 proving this claim by a preponderance of the evidence.

17 Specifically, Mr. Foder claims here that the PATH  
18 is at fault because PATH failed to provide Plaintiff with a  
19 reasonably safe workplace, as PATH failed to provide a  
20 reasonably safe climbing system to access the rail car.  
21 Plaintiff also claims that PATH failed to provide a proper  
22 non-slip surface on the portion of the anti-climber where  
23 Plaintiff was required to place his foot when boarding  
24 Defendant's rail car. PATH denies Mr. Foder's claim.

25 PATH also asserts that Mr. Foder was negligent and

1       that this negligence was a cause of the claimed injury. In  
2       other words, PATH claims that, even if it is at fault,  
3       Mr. Foder should share responsibility for his own injuries.  
4       PATH has the burden of proving this claim by a preponderance  
5       of the evidence.

6               Specifically, PATH claims here that Mr. Foder was  
7       also at fault because Plaintiff failed to follow the  
8       training provided by PATH with respect to how to properly  
9       climb a train from track level; Plaintiff failed to use the  
10      gloves provided to him to climb the train; Plaintiff failed  
11      to place his foot securely on the anti-climber; Plaintiff  
12      failed to properly secure his hands to the grab bar before  
13      climbing onto the train, and Plaintiff failed to report an  
14      unsafe condition with respect to the anti-climber or track  
15      prior to his accident. Mr. Foder denies PATH's claims.

16             If you determine that both Mr. Foder and PATH's  
17      negligence were causes of Mr. Foder's injury or damage, then  
18      you will be asked to compare the negligence of both and  
19      determine what amount or percentage of fault is attributable  
20      to Mr. Foder.

21             I will now explain certain terms I had mentioned  
22      before in more detail. First, negligence and reasonable  
23      care.

24             I used the term "negligence." You are instructed  
25      that negligence is the failure to use reasonable care.

1 Reasonable care is the degree of care that a reasonably  
2 prudent person would use under like circumstances. The law  
3 does not say how a reasonably prudent person should act;  
4 that is for you to decide. Negligence may be either doing  
5 something that a reasonably careful person would not do  
6 under like circumstances, or failing to do something that a  
7 reasonable careful person would do under like circumstances.

8 The fact that an accident or injury may have  
9 happened does not mean that it was caused by anyone's  
10 negligence. PATH is not required to guarantee Mr. Foder's  
11 safety. The extent of PATH's duty is to exercise reasonable  
12 care under the circumstances to see that the workplace is  
13 reasonably safe.

14 PATH's duty is measured by what is reasonably  
15 foreseeable under the circumstances. That depends on the  
16 circumstances which are known or should be known and varies  
17 in proportion to the harm that persons reasonably should  
18 foresee.

19 A railroad may be found negligent under the FELA  
20 if it fails to prescribe, promulgate, or enforce adequate  
21 rules, procedures, and regulations for the safe operation of  
22 its rail cars or if it fails to train or instruct its  
23 employees on these rules, procedures, and regulations.

24 Even if the evidence reveals that the Defendant  
25 complied with an applicable safety statute or regulation, it

1 is still liable for Plaintiff's injuries if, under the  
2 circumstances, a reasonable person would have taken  
3 additional precautions to prevent harm.

4 The Defendant, however, PATH, was not required to  
5 furnish Plaintiff with the latest, best, or most perfect  
6 rail cars, provided those in use are reasonably safe and  
7 suitable. You may not find Defendant liable merely because  
8 there may be safer equipment or a safer method of performing  
9 the work in question.

10 I also discussed PATH's assertion that Mr. Foder's  
11 negligence has caused or contributed to his own injuries.  
12 This is called contributory negligence. Contributory  
13 negligence is a careless act or omission of the Plaintiff  
14 tending to add new dangers to conditions that the employer  
15 negligently created or permitted to exist. You should  
16 consider this. But you may not find contributory negligence  
17 on the part of Mr. Foder simply because he acceded to the  
18 request or direction of the responsible representatives of  
19 his employer that he work at a dangerous job, or in a  
20 dangerous place, or under unsafe conditions. In other  
21 words, you cannot find that Mr. Foder was contributorily  
22 negligent just because he assumed the risk of his  
23 employment.

24 Finally, the fact that Plaintiff's physical  
25 condition prior to the accident may have made him

1       susceptible to greater injury and loss than could have been  
2       anticipated by the railroad does not in any way reduce his  
3       recovery in the case. A tortfeasor takes his victim as he  
4       finds him and is liable for the full extent of the damages  
5       sustained, even if they are greater than he could have  
6       foreseen because that particular Plaintiff is susceptible to  
7       the injury. Thus a railroad whose actions exacerbate or  
8       aggravate a pre-existing asymptomatic condition is  
9       nonetheless liable for all of the Plaintiff's resulting  
10      losses.

11               Second, causation.

12              I also used the term "cause" or "causation." If  
13      negligence is proved, Mr. Foder must also show that it was a  
14      cause of the injury for which he seeks damages. To be a  
15      cause of the injury, the negligence must have played a part,  
16      no matter how small, in bringing about the injury.  
17      Negligence may not be -- may be a cause of injury even  
18      though it operates in combination with another's act or with  
19      some other cause, if the negligence played any part in  
20      causing the injury.

21               Third, damages.

22              I used the term "damage." The damage a party  
23      suffers means the amount of money that will fairly  
24      compensate him for any injury he sustained and is reasonably  
25      certain to sustain in the future.

1           It is the duty of one who has been injured to use  
2     reasonable diligence and means in caring for his injuries in  
3     order to prevent their aggravation, to accomplish healing,  
4     and to minimize his resulting damage. Failure of the  
5     injured party to make a reasonable effort to minimize  
6     damages does not prevent all recovery, but does preclude  
7     recovery for damages or losses which would have been avoided  
8     had a reasonable effort to lessen damages been made.

9           In this case, you are instructed to only consider  
10    two types of compensation: One, the amount of money that  
11    will compensate Mr. Foder for his pain and suffering, and,  
12    two, the amount of money that will compensate him for his  
13    lost overtime.

14           I will now explain pain and suffering and lost  
15    overtime in more detail.

16           "Pain and suffering" means the physical pain and  
17    suffering including any aggravation of a pre-existing  
18    condition that Plaintiff has experienced and is reasonably  
19    certain to experience in the future. No evidence of the  
20    dollar value of physical pain and suffering has been or  
21    needs to be introduced. There is no exact standard for  
22    setting the damages to be awarded on account of pain and  
23    suffering. You are to determine an amount that will fairly  
24    compensate the Plaintiff for the injury he has sustained.

25           "Lost overtime" means the amount of overtime that

1 Mr. Foder would have earned from July 23rd, 2011 to February  
2 17th, 2012, then from October 28th, 2013 to April 4th --  
3 April 7th, 2014, and, finally, from November 25th, 2014 to  
4 April 17th, 2015 if he were not injured.

5 If you come to the point where you must calculate  
6 these damages, you must only consider these two issues -  
7 pain and suffering, as I've described it, and lost overtime  
8 as I've described it. Pain and suffering and lost overtime  
9 are two unrelated values. Your assessment of one should not  
10 impact the assessment of the other. It is also extremely  
11 important that you only consider these two issues. You are  
12 specifically instructed not to consider regular wages or  
13 medical bills. They are not at issue in this case. You  
14 should put them out of your mind.

15 You must also not engage in any speculation,  
16 guess, or conjecture, and you must not award any damages by  
17 way of punishment or through sympathy.

18 Finally, do not make any reduction in the amount  
19 of damages that you award based on any percentage of  
20 negligence that you have determined.

21 Stipulations.

22 The parties have stipulated, or agreed, that when  
23 Mr. Foder was injured, he was an employee of PATH performing  
24 duties in the course of that employment, and that PATH was a  
25 common carrier by railroad engaged in interstate commerce.

1                   How You Will Answer the Verdict Sheet.

2                   You will be given a verdict sheet where you will  
3 write down your decision. We give you one verdict sheet.  
4 That sheet will have four questions to answer which will be  
5 based on the information that I just explained to you. I  
6 will now explain these questions.

7                   Question 1.

8                   In Question 1, you must consider whether Mr. Foder  
9 has proved by a preponderance of the evidence that, one,  
10 PATH was negligent in one or more ways Mr. Foder claims;  
11 and, two, PATH's negligence played any part in causing the  
12 injury for which Mr. Foder seeks damages.

13                   If Mr. Foder proves both elements, you must write  
14 "Yes" and move on to the next question.

15                   But if Mr. Foder does not prove both of those  
16 elements, you must write "No" and turn in the verdict sheet.

17                   Question 2.

18                   In Question 2, you must consider whether PATH has  
19 proven by a preponderance of the evidence that, one,  
20 Mr. Foder was also negligent in any one or more of the ways  
21 PATH claims; and, two, Mr. Foder's negligence played any  
22 part in causing the injury for which he seeks damages.

23                   If PATH proves both elements, you must write "Yes"  
24 and move to the next question. If PATH does not prove both  
25 these elements, you must write "No" and move to the next



1 question.

2 In Question 3, you will decide to what extent  
3 Mr. Foder's injury was caused by his own negligence. This  
4 should be answered in terms of percentage per party,  
5 totaling 100 percent. You will only answer this question if  
6 you find that PATH was negligent and that Mr. Foder was also  
7 negligent. In other words, you will only answer this  
8 question if you answered "Yes" to Question 2.

9 In Question 4, the final question, you will  
10 indicate the dollar amount of Mr. Foder's damage. You will  
11 write in that dollar amount, if any, of Mr. Foder's pain and  
12 suffering in the blank line so indicated. You will write in  
13 the dollar amount, if any, of Mr. Foder's lost overtime in  
14 the blank line so indicated. Your answers for pain and  
15 suffering must not take into consideration any possible  
16 negligence by Mr. Foder.

17 Deliberating.

18 I have just described for you the various concepts  
19 that you are going to have to address when deciding the  
20 case. You will next hear closing statements. All the  
21 instructions I just provided to you apply to this final part  
22 of the trial.

23 To assist you in reaching a verdict, you will have  
24 with you in the jury room a verdict form consisting of  
25 questions calling for certain answers. The verdict form

1 does not constitute evidence. I will also give you a copy  
2 of this charge.

3 To assist you in your deliberations, you will be  
4 provided with all the exhibits.

5 Your deliberations will be chaired by a  
6 foreperson. You shall select your own foreperson as soon as  
7 you get settled in the jury room. I suggest that you take a  
8 vote and select someone. The foreperson shall preside over  
9 your discussions, conduct any votes you choose to take on  
10 the questions you are considering, and announce your verdict  
11 in open court. Exactly how you conduct your business in the  
12 jury room is up to you. I suggest that a show of hands, a  
13 role call, or written ballot slips can be used. If you do  
14 use written ballot slips, however, please be sure to destroy  
15 them before you leave the jury room, and do not bring them  
16 out of the room under any circumstances.

17 Your verdict in this case will be announced at the  
18 end of your deliberations and in open court.

19 As I mentioned a moment ago, the first duty you  
20 will be asked to discharge in the jury room will be to  
21 select from your number a person who will serve as the  
22 foreperson of the jury. How that person then proceeds to  
23 discharge the function is entirely up to you. For my  
24 purposes, though, that is the person who should compose and  
25 transmit any notes to the Court, and that is also the person

1       who should make the final entries on the verdict sheet.

2               The foreperson will be the person who will be  
3       asked to hand up the verdict and report to the bench when  
4       your verdict is returned.

5               Nothing said in these instructions and nothing in  
6       any form of verdict prepared for your convenience is meant  
7       to suggest in any way what your verdict should be. What the  
8       verdict shall be is your sole and exclusive duty and  
9       responsibility.

10              Your verdict must be unanimous. All members of  
11       the deliberating jury must agree as to the verdict. Any  
12       verdict other than unanimous is not a legal verdict and will  
13       not be accepted by the Court.

14              Following closing statements, you will retire to  
15       the jury room to commence your deliberations and apply the  
16       law as I have instructed to you to the facts as you find  
17       them for the purposes of arriving at a fair and correct  
18       verdict. The verdict must represent the considered judgment  
19       of each juror.

20              It is your duty as jurors to consult with one  
21       another and to deliberate with a view to reaching an  
22       agreement, if you can do so without violence to individual  
23       judgment. Each of you must decide the case for yourself,  
24       but do so only after impartial consideration of the evidence  
25       with your fellow jurors. In the course of your

1 deliberations, do not hesitate to re-examine your own views  
2 and change your opinion if convinced it is erroneous; but do  
3 not surrender your honest conviction as to the weight or  
4 effect of evidence solely because of the opinion of your  
5 fellow jurors, or for the mere purpose of returning a  
6 verdict.

7           You are not partisans. You are the judges -  
8 judges of the fact. Your sole interest is to ascertain the  
9 truth from the evidence in this case. You are to perform  
10 your duty without bias or prejudice to any party. The law  
11 does not permit jurors to be governed by bias, sympathy,  
12 prejudice or public opinion. Both the Plaintiff and  
13 Defendant expect that you will carefully and impartially  
14 consider all of the evidence, follow the law as the Court  
15 has stated it, and reach a fair and just verdict.

16           If during your deliberations you have a question  
17 or feel that you need further assistance or instruction, or  
18 wish part of the testimony read back, write your inquiry on  
19 a sheet of paper and give it to the court officer stationed  
20 at the jury room door, who, in turn, will give it to the  
21 Court. In the presence of the parties and counsel, the  
22 Court will answer your inquiry. It may take a while for us  
23 to prepare a response, so don't stop deliberating and wait  
24 for us to answer. Move on to other matters if you can. We  
25 will resolve your question as soon as we can. If testimony

1 is read back to you, you may not give undue weight to the  
2 testimony that is read back to you.

3 I instruct you that in writing notes to the Court,  
4 please do not indicate how your votes are going, if at that  
5 point you have taken any votes. Except for announcing your  
6 verdict, absolutely no one outside the jury is to be given  
7 any idea of what your thoughts are on any part of the case.  
8 When you start deliberating, do not talk to the jury  
9 officer, or me, or anyone else but each other about the  
10 case. During your deliberations, you must not communicate  
11 with or provide any information to anyone about the case.  
12 You may not use any electronic devices or media, such as a  
13 cell phone, smartphone, BlackBerry, iPhones, or any  
14 computer, the internet, any internet service, any text  
15 messaging, instant messaging, or any internet chat room,  
16 blog, website, or social network such as Facebook, MySpace,  
17 LinkedIn, or YouTube to communicate in any way, shape, or  
18 form about this case or conduct research until I accept your  
19 verdict.

20 During the course of a trial such as this, the  
21 emotions of all concerned are on display. This includes  
22 witnesses and lawyers, as well as the Court. It is part of  
23 a real life drama. Remember, each party's claims or  
24 defenses are to be decided purely on the evidence presented  
25 and not on your own perception of how counsel related to

1 each other, to the witnesses, or to the Court. You are  
2 engaged in a search for truth, and matters of advocacy -  
3 adversarial interaction - are not relevant to the search.  
4 Your only concern should be rendering a fair and impartial  
5 verdict based solely on the evidence presented and the legal  
6 instructions given.

7 Ladies and gentlemen: Serving as a juror in a  
8 case such as this is one of the most solemn duties that a  
9 community can entrust to its citizens. The responsibility  
10 that rests upon you is a weighty one: To be fair and  
11 impartial jurors.

12 When you have reach a unanimous verdict, you  
13 should advise the Deputy Marshal outside the door that you  
14 have done so, and he will report that fact to the Court.  
15 Again, do not indicate what the verdict is. After you have  
16 been ushered back to your seats in the jury box, I will  
17 request that the foreperson rise, and ask, Have you reached  
18 a verdict? I presume the answer will be yes. I will then  
19 ask the foreperson to hand me the verdict form. I will  
20 review it, and then ask the foreperson to announce your  
21 verdict to the courtroom.

22 Ladies and gentlemen, decide this case on the  
23 facts and the inferences supported by the evidence and the  
24 legal principles involved as I have just instructed you. In  
25 every respect, your judgment should be considered,

1 deliberate, objective, deriving its force and validity from  
2 the facts and inferences reasonably and logically supported  
3 by the testimony and other evidence.

4 Now, ladies and gentlemen, I have concluded my  
5 instructions. You will next hear closing statements. Then  
6 you will begin your deliberations.

7 You may have noticed that whenever you left or  
8 entered the courtroom, everyone stood. We do that for a  
9 very important reason, and that is to convey to each of you  
10 that, together, you are the judges of this case. By  
11 standing, we accord you the respect to which you, as jurors,  
12 are entitled. I am confident that you will live up to our  
13 expectations and deliberate with all the care that justice  
14 requires and both parties deserve.

15 Counsel, I have come to the end of my charge. If  
16 you have any objections, kindly approach the sidebar and the  
17 Court will hear you.

18 Anything?

19 MR. ROSENTHAL: Can I see you at sidebar for a  
20 moment, not on an objection, but --

21 THE COURT: Okay. Sure.

22 (The following takes place at sidebar)

23 MR. ROSENTHAL: What is Your Honor's policy on  
24 rebuttal?

25 THE COURT: There is no rebuttal.

1 MR. ROSENTHAL: Okay.

2 THE COURT: Thank you both for being so respectful  
3 at sidebar. I've had lawyers huff and puff and run away  
4 while I was talking. And I want to tell you all on the  
5 record that you were a pleasure to have in my courtroom, and  
6 I appreciate your respect to the Court, and to the jury, and  
7 to Chuck. Thank you.

8 MR. ROSENTHAL: Thank you, Your Honor.

9 MR. MINO: Thank you, Your Honor.

10 THE COURT: Okay.

11 (The following takes place in open court)

12 THE COURT: Mr. Mino? You're first.

13 MR. MINO: Sure.

14 Good morning, ladies and gentlemen of the jury.

15 Before I start, I want to thank you for your time  
16 and your patience. It's not always easy, I know that. But  
17 you guys doing what you do and sitting there and listening  
18 to us allows me to do my job, and quite frankly the most fun  
19 part of my job, trying the case. So thank you very much.

20 Now, at the opening of my case, I told you that  
21 this case was going to be about the carelessness and the  
22 mistakes that are made when a person becomes too comfortable  
23 in their routine, when they're doing something that they've  
24 done a hundred times and they just don't pay attention the  
25 way they should.



1                   And now that you've heard the evidence in this  
2                   case, I think you've seen the carelessness that happened on  
3                   July 22nd, 2011.

4                   Before we get into it, though, let's just discuss  
5                   exactly what the Plaintiff has to demonstrate in this case.

6                   You just heard Judge Arleo say it's Mr. Foder that  
7                   bears the burden of proof in this case. He must prove his  
8                   elements by a preponderance of the evidence - more likely  
9                   than not. That's the scales that Judge Arleo just talked to  
10                  you about.

11                  And what exactly does he need to prove?

12                  He needs to prove by a preponderance of the  
13                  evidence that PATH failed to provide a reasonably safe  
14                  workplace and that that failure caused, in whole or in part,  
15                  his injuries.

16                  And, ladies and gentlemen of the jury, I submit to  
17                  you that Plaintiff has failed to meet his burden.

18                  Now, Plaintiff claims that PATH was negligent in  
19                  two ways: One, that there wasn't anti-slip tape on the  
20                  anti-climber, and, two, because of the climb system  
21                  provided, the end step and the grab bars.

22                  Now, Plaintiff is going to want you to immediately  
23                  start thinking about those questions, immediately think  
24                  about, did PATH do anything wrong.

25                  However, I think there's a critical question that

1       you need to consider first. That's, what exactly happened  
2       on July 22nd, 2011?

3               Now, why would Plaintiff want you to just jump  
4       right into, did PATH do anything wrong?

5               Because, ladies and gentlemen of the jury, the  
6       truth of what actually happened on July 22nd, 2011 does not  
7       demonstrate a failure of PATH, but a failure of Mr. Foder.

8               Now, let's think about the evidence of what  
9       happened that day. All right?

10              You were told -- you heard three different stories  
11       - three different stories of what happened to Mr. Foder and  
12       what caused him to fall.

13              Only one of them makes sense. And I submit to  
14       you, ladies and gentlemen of the jury, the best evidence of  
15       what happened that day is what was said closest in time to  
16       the accident.

17              Everyone knows memory doesn't get better over  
18       time, it only gets worse. That's why it's important that as  
19       soon as something happens, or as close in time to it, we get  
20       an accurate picture of it.

21              You heard Mr. Avril say that whenever a PATH  
22       employee gets hurt, they have to fill out an accident report  
23       as soon as they can.

24              And you heard about the accident report that  
25       Mr. Foder filled out that day.

1                   It's right here: Defendant's Exhibit A. You will  
2                   have this back in that room when you deliberate. You can  
3                   look at it and you can read what's written on it. All  
4                   right?

5                   This was filled out by Mr. Foder a few hours after  
6                   he fell, only a couple of hours. Everything is fresh in his  
7                   mind at that point. Okay?

8                   And you heard the testimony. He was asked on this  
9                   form, in his own handwriting, describe how the injury  
10                  occurred.

11                  Does he say that his left foot slipped?

12                  No.

13                  Are the words "left foot" found on here at all?

14                  No.

15                  His description: "As I was climbing onto the  
16                  train on S1 I put my right foot into the...footstep and  
17                  grabbed hold of the climbing rail." And "As I lifted my  
18                  body up my right ankle slipped and rolled over on me. I  
19                  tried to hold on but due to my hands being sweaty I couldn't  
20                  hold on."

21                  Ladies and gentlemen of the jury, that  
22                  description, he never places his left foot on the  
23                  anti-climber. A couple hours after the accident, he's  
24                  telling you he never places his left foot on the  
25                  anti-climber.

1           The cause of his accident is sweaty hands.

2           He then fills out the Unusual Occurrence Report.

3       Again, asked to describe the incident: "As I was climbing  
4       onto the train on S-1 I put my right foot into the right  
5       footstep, grabbed hold of the R-1." And "As I lifted my  
6       body up my right ankle slipped and rolled." And "I tried to  
7       hold on but due to my hands being sweaty I slipped and  
8       fell."

9           Again, cause of the fall is sweaty hands.

10          Now, Mr. Foder attempts to explain this by saying,  
11       well, I was really in pain at the time, I just wanted to go  
12       home, I wanted -- wanted things to be over quickly.

13          But this is where your common sense comes in. How  
14       much longer would it have taken to write the phrase, my left  
15       foot slipped? Thirty seconds? Thirty seconds was going to  
16       be the breaking point?

17          And look at this: He goes over the amount of  
18       space in the box. It wasn't as if he wrote two or three  
19       words. He had the time to write out the entire thing, but  
20       left out his left foot slipping.

21          Ladies and gentlemen of the jury, that's because  
22       his left foot never slipped because he never placed it  
23       there. All right?

24          Does it make sense to you that when you're asked  
25       to describe an accident a few hours later that you're going

1 to leave out the literal moment you start -- start to slip?

2 That doesn't make sense at all.

3 And you know it doesn't make sense, because  
4 Mr. Foder went up there and testified that whether or not  
5 his hands are sweaty didn't come into play at all because,  
6 if he was glued to the bar, it wouldn't have mattered  
7 because his foot already slipped.

8 So if you want to believe that, then Mr. Foder,  
9 when asked to describe the incident, wrote something that  
10 did not apply.

11 Ladies and gentlemen of the jury, that doesn't  
12 make any sense.

13 Hold Mr. Foder to the words that he wrote a few  
14 hours after the accident. All right? Don't let him rewrite  
15 these words. This is what happened.

16 Mr. Foder could have put on the gloves that day,  
17 but he didn't. Gloves, again, aren't even mentioned. He  
18 says, my hands are sweaty and I fall.

19 Now, a few days after the accident, we get story  
20 number two, and that story is not sweaty hands anymore.  
21 We've gotten rid of the sweaty-hands thing. This time, it's  
22 grease on the shoes. All right?

23 And we see this for the first time in the PATH  
24 medical file. There's a note from July 25th, 2011, the  
25 first time Mr. Foder goes to see the PATH Medical

1 Department. And in that note, it says that Mr. Foder said  
2 that he thought that he slipped and fell because he had  
3 grease on his shoes.

4 So this is story number two. And he then tells  
5 this again to the physical therapist on August 1st, 2011, so  
6 about a week and a half, two weeks after his accident.

7 Now, you can't blame pain for this version of the  
8 story, because, when he goes to PATH Medical, he says his  
9 ankle's doing better, and when he goes to the rehabilitation  
10 place, he says his ankle pain is one out of 10. So we can't  
11 blame pain for this one.

12 But we know that it's unlikely that Mr. Foder fell  
13 on grease. When he was up there, he couldn't specifically  
14 identify where the grease was. He eventually just said,  
15 well, you know, it's -- or he eventually just gave a general  
16 assumption of what he thought the area was probably like.  
17 But there was no specifics. Right?

18 And how else do we know there wasn't grease?  
19 Because right after Mr. Foder fell, in fact, when he was  
20 still on the ground and he was there, a PATH car inspector,  
21 you heard from him, Dennis Velez, went to the train. He  
22 looked at the end step. No grease, no oil, no water.

23 He looked at the anti-climber. No grease, no oil,  
24 no water.

25 This is all written in the memo to Mr. Avril,

1 Exhibit C. You will also have this back there with you.

2 So now we come to the third story, right? This is  
3 the one that we heard up on the witness stand, right?

4 This time, this story is, well, I was walking very  
5 carefully, made sure not to step on anything. I get to the  
6 train, I begin to climb as I was taught, I placed my foot  
7 mostly on the diamond plate, and I slip and fall. All  
8 right?

9 Mr. Widas actually described his version as  
10 perfect. And it should be. I mean, it's taken a long time  
11 to craft and to be told. Right?

12 But let's think about what else we heard.

13 When Mr. Foder described his accident, he said it  
14 happened in a split second, he said less than two seconds  
15 from when he starts to climb up until when he falls.

16 Yet he wants you to believe that he can  
17 specifically remember where he placed his foot. He can't  
18 specifically remember the grease, he can't specifically  
19 remember any oil, but he can specifically remember, he wants  
20 you to believe, that he placed -- exactly where he placed  
21 his foot, despite the accident taking a split second.

22 Now, ladies and gentlemen of the jury, we know  
23 that this story also doesn't make sense. And how are some  
24 of the ways that we know this?

25 Well, did you ever hear from Mr. -- did Mr. Foder

1       ever say when he was up there that he complained about the  
2       condition of the anti-climber or the climb system prior to  
3       July 22nd, 2011?

4               No.

5               Did you ever hear Mr. Foder say that prior to July  
6       22nd, 2011, he had any problems using that climb system or  
7       climbing up a train?

8               No.

9               And what else did you hear?

10              You heard that car inspector Dennis Velez, right  
11       after Plaintiff's accident, climbed up the train - not a  
12       problem.

13              And perhaps, to me, one of the best pieces of  
14       evidence, and you might have missed it because it was late  
15       in the day and it didn't take very long, was Sandra Bou.

16              Sandra Bou was the conductor working with  
17       Mr. Foder. Right? She went up right before him.

18              You saw her walk in here. Sandra Bou at the time  
19       of the accident was approximately 45 years old, and she's a  
20       five-foot-one woman, and she could make it up there safely.

21              But Mr. Foder would have you believe that as a  
22       24-year-old guy, six feet tall, it was unsafe for him.

23              But Sandra Bou could do it.

24              It simply doesn't hold up.

25              Now, I think it's pretty clear, ladies and



1 gentlemen of the jury, that the most likely story is, as I  
2 said, the first one, the one that's written on Defendant's  
3 Exhibit A and Exhibit B, and based on that, you can't find  
4 PATH negligent, because the cause of the accident is sweaty  
5 hands.

6 Now, PATH can do a lot of things, but PATH cannot  
7 control the weather. PATH can't make it less hot. They  
8 just simply can't.

9 Now, if you, though, choose to believe Mr. Foder's  
10 third version of the accident, the one you heard up there,  
11 Mr. Foder still caused or contributed to this accident. And  
12 it's at this point that you get to the questions that  
13 Plaintiff wants you to consider: Was PATH negligent because  
14 of the anti-slip tape or was PATH negligent because of the  
15 climb system?

16 And you just heard the jury instruction from  
17 Judge Arleo about PATH failing to provide a reasonably safe  
18 workplace.

19 In order to meet this burden, Mr. Foder relies on  
20 his own testimony as well as that of George P. Widas, the  
21 supposed expert that testified, right?

22 But think about all the testimony you heard,  
23 ladies and gentlemen of the jury.

24 Mr. Foder, Mr. Widas, and no one else here said  
25 that PATH train car 5678 did not comply with all applicable

1 government regulations at the time of the accident. In  
2 fact, what you heard from everyone involved was that PATH  
3 train car 5678 complied with all the regulations. It was  
4 exactly as it was required to be under the FRA.

5 You didn't hear one witness testify that there was  
6 a requirement to put grip tape on the anti-climber. You  
7 didn't hear one witness say that the FRA required it. Okay?

8 And let's talk about the FRA, the Federal Railroad  
9 Administration. This is the government agency that governs  
10 PATH.

11 You heard time and time again about how the train  
12 car complied with the FRA regulations, right? And you can  
13 see for yourselves, Defendant's Exhibit E, which goes back  
14 with you, the daily inspections that PATH does to meet its  
15 FRA requirements. No problems with car 5678.

16 You also heard from railroad safety regulation  
17 expert Augustine Ubaldi. He said when he looked at the car,  
18 nothing wrong with the end step, nothing wrong with the  
19 anti-climber, nothing wrong with the grab bar. All of it  
20 met the applicable regulations.

21 So what does this mean?

22 This means that Mr. Foder is saying that PATH  
23 should have gone above and beyond. Right?

24 But, ladies and gentlemen of the jury, Judge Arleo  
25 just instructed you this isn't the standard. PATH doesn't

1 have to provide the best or the latest or the safest or the  
2 most perfect train car. Right? They're only obligated to  
3 provide a reasonably safe train car.

4 Now, there was the instruction that just because  
5 PATH complied doesn't automatically mean they're not  
6 negligent. And that's true. However, compliance is  
7 evidence that PATH acted reasonably, and you should listen  
8 to that evidence, right?

9 And the question isn't really whether -- or it's  
10 not at all whether or not something can be made safer.  
11 Almost anything can be made safer, right? Me standing here  
12 right now, it's probably safer if I just had a seat, but I  
13 don't really think that I would be allowed to do that,  
14 right?

15 So you don't look at whether or not something can  
16 be made safer; you look at whether or not what was there was  
17 safe.

18 And, ladies and gentlemen of the jury, I submit to  
19 you that it was safe. It met all the regulations that it  
20 needed to.

21 And how else do we know that PATH acted  
22 reasonably, that PATH provided a reasonably safe workplace?

23 Well, let's think about it.

24 When the cars first came in, you heard Mr. Wallace  
25 testify about it. The FRA came and looked at the cars. The

1 Federal Railroad Administration, the thing that governs  
2 PATH, comes and looks at the cars, found no problem with  
3 that climb system, found no problem with that anti-climber.  
4 They do daily inspections, every 24 hours, right, looking at  
5 the train car: Is there anything wrong with the end step,  
6 is there anything wrong with the anti-climber, is there  
7 anything wrong with the grab bar? And they do inspections  
8 every 92 days, the periodic inspections that Mr. Wallace  
9 talked about, looking at the same stuff. No inspection, the  
10 92-day, the daily inspection, or the initial FRA inspection  
11 where they were telling them if anything needed to be  
12 changed, at no point was any of that a problem.

13 And then you heard about the training that  
14 Mr. Foder received. Mr. Avril talked about that  
15 extensively. Right? They recognize that someone needs to  
16 be taught how to climb up onto the train, right?

17 So what did we hear?

18 Mr. Avril said, well, at orientation, the very  
19 first day, they are shown how to climb up onto that train.  
20 The very first day.

21 And what did Mr. Avril say about it? If you're  
22 climbing up on the right side, your right foot in the end  
23 step, you grab onto the grab bar with both hands, maintain  
24 three points of contact, you pull yourself up, and you place  
25 your left foot on the diamond plate.

1                   Now, he did say if you have like size 15 feet,  
2                   really big feet, maybe some of it might have to get on the  
3                   edge.

4                   Mr. Foder doesn't have size 15 feet. Right?

5                   The instruction from Mr. Avril is put your foot  
6                   securely on the anti-climber on the diamond plate.

7                   And in addition to training them how to do it,  
8                   they provide them with gloves.

9                   These are the gloves. They provide them with  
10                  these gloves. You put them on, you tighten them, you're  
11                  ready to go, you're ready to climb up the train.

12                  Mr. Foder mentioned these conductor's gloves. But  
13                  look at the difference. You heard all the manual work  
14                  engineers need to do, all the things they need to do  
15                  compared to the conductors. Mr. Avril said, if I gave these  
16                  gloves to engineers, they wouldn't last a day.

17                  So Mr. Foder, who doesn't even put on gloves when  
18                  he's climbing, seems to think that this, the glove that  
19                  isn't going to last a day, is better than this glove.

20                  It just simply doesn't hold up.

21                  Now, based on the inspections, based on the  
22                  training, based on the equipment provided, I think it's  
23                  clear that PATH acted reasonably in this scenario.

24                  And let's just talk for a second about the  
25                  testimony of Mr. Widas.

1                   Now, there was a lot of like nevers with  
2           Mr. Widas, right: He never worked on a railroad, never had  
3           to perform the functions of a train engineer, never climbed  
4           up that climb system that he dislikes so much, never saw  
5           anyone climb up it, and never actually took any  
6           slip-resistance measurements of the grab bar or the  
7           anticlimber, right?

8                   MR. ROSENTHAL: Your Honor.

9                   THE COURT: Yes.

10                  MR. ROSENTHAL: Objection, Your Honor.

11                  THE COURT: On what basis?

12                  MR. ROSENTHAL: On the basis of, he's talking  
13           about why -- Mr. Widas not measuring the slip resistance.

14                  MR. MINO: I will go back --

15                  THE COURT: Okay.

16                  MR. ROSENTHAL: And that was something that we --

17                  MR. MINO: I will go back and rephrase the way I  
18           said it.

19                  THE COURT: Let's talk at sidebar for a second.

20                  MR. MINO: Sure.

21                  (The following takes place at sidebar)

22                  THE COURT: Yes?

23                  MR. ROSENTHAL: Counsel mentioned that Mr. Widas  
24           didn't do measurements on the slip resistance of the diamond  
25           plate, and the reason he didn't do it was because they had

1       -- there was tape on there, and when asked the question of  
2       why he didn't do the slip resistance, he said the conditions  
3       had changed.

4               Now, I believe that counsel just opened the door  
5       for me to get into --

6               THE COURT: No, you can't get into anything  
7       because it's not evidential. That's the first thing.

8               I'll give a limiting instruction.

9               MR. MINO: I said anti-climber, not diamond plate,  
10       and that was wrong. To me, I should have said diamond  
11       plate, because that was a safety issue, and he could have  
12       measured it. However, if you are telling me to not mention  
13       it at all --

14              THE COURT: I'm going to instruct them to  
15       disregard anything at the end -- right now, to disregard  
16       anything having to do with measuring of the area, the  
17       anti-climber area.

18              MR. MINO: Okay.

19              MR. ROSENTHAL: And also, I wanted to mention that  
20       Mr. Ubaldi had talked about that the area was safe, and all  
21       he -- Mr. Ubaldi was able to testify here was that it met  
22       the FRA standards. So I was going to wait until he was done  
23       and place that objection to that statement on the record.

24              MR. MINO: He testified that it didn't violate the  
25       FRA.

1 MR. ROSENTHAL: Right, but not that it was safe.

2 MR. DiGIULIO: You said that he inspected it and  
3 it was safe. That's the problem.

4 THE COURT: So let me write these both down.

5 So we're going to instruct the jury to ignore the  
6 statement that, one, Mr. --

7 What's your expert's name?

8 MR. MINO: Ubaldi.

9 MR. ROSENTHAL: Ubaldi.

10 MR. MINO: U-b-a-l-d-i.

11 THE COURT: -- testified that it was safe, and,  
12 two, that Mr. --

13 What's your expert's name?

14 MR. ROSENTHAL: Widas.

15 THE COURT: -- Widas failed to measure the --

16 MR. ROSENTHAL: Slip resistance.

17 MR. MINO: Of the anti-climber.

18 THE COURT: Move off it, okay? Stick with the  
19 evidence. This is careful stuff. We have to be real  
20 careful here, okay?

21 All right. So noted. I'll tell the jury right  
22 now.

23 Thank you.

24 MR. ROSENTHAL: Thank you.

25



1 (The following takes place in open court)

2 THE COURT: Okay. Before I allow counsel to  
3 continue, I'm going to give you two additional instructions:  
4 To ignore counsel's statement that Mr. Ubaldi testified that  
5 the work area was safe - you're to ignore that statement as  
6 evidence in this case; and, two, that Mr. Widas failed to  
7 measure the slip resistance of the anti-climber.

8 Those two statements made by defense counsel  
9 should be ignored. Okay?

10 And you can continue.

11 And they should be ignored and not submitted to  
12 you as arguments based on relevant evidence in this case.

13 Continue.

14 MR. MINO: Sure.

15 So, to kind of pick up where I left off, Mr. Widas  
16 never works on a railroad, never performs the functions of a  
17 train engineer, never climbed up the train, and never saw  
18 anyone climb up the train, right?

19 But Plaintiff will still use him to argue that  
20 PATH was negligent.

21 And let's think about what Mr. Widas actually is.  
22 Right? He's a safety consultant. He's hired by people to  
23 say how you can make things better, how you can make things  
24 safer. Right? And of course, if the Plaintiff is going to  
25 hire him, he's going to find something wrong, or otherwise,

1       why would he get paid, right? And he's even said every time  
2       he looked at PATH --

3               MR. ROSENTHAL: Objection, Your Honor.

4               THE COURT: Hold on.

5               What's your objection based on?

6               MR. ROSENTHAL: On improper commenting on the  
7       credibility of the witness.

8               THE COURT: I'll overrule it.

9               You can continue.

10              MR. MINO: Now, let's talk about what Mr. Widas  
11       said about the grab bar and the end step.

12              He fully admitted that he wasn't testifying as to  
13       whether or not it was within compliance of FRA regulations,  
14       right? He was using the FRA regulations in his mind to try  
15       and help guide him.

16              And when asked, well, what would you really do  
17       with the grab bar and the end step, well, he said, well, I  
18       think I would move that grab bar over, but you've got to  
19       bring it up and over.

20              So his first inclination is to make that grab bar  
21       that he says is asymmetrical and really hard to grab, to  
22       actually move it up higher.

23              Does that make any sense to you?

24              I think no.

25              And then with respect to the end step, you heard

1 the testimony from Mr. Ubaldi. It's going to be very hard  
2 to move that end step in, because you need to allow the  
3 train -- he talked to you about the coupling device. You  
4 need to allow the train to be able to move around the  
5 curves, and if you move that end step in, the coupler arm  
6 won't be able to swing.

7 So this testimony about moving the grab bar or  
8 moving the end step, ladies and gentlemen of the jury,  
9 there's just no proof that any of that is actually feasible.  
10 In fact, where Mr. Ubaldi ended -- or, strike that -- where  
11 Mr. Widas ended up was, when asked, well, wouldn't that  
12 moving it up higher make it more difficult, he said if it  
13 were up to him, he'd just kind of scrap the whole design and  
14 start from the beginning.

15 So let's go back to kind of where we started.

16 Did Plaintiff prove by a preponderance of the  
17 evidence that PATH failed to provide a reasonably safe  
18 workplace? It's going to be your first question on the  
19 verdict sheet.

20 And, ladies and gentlemen of the jury, I submit to  
21 you that your answer there should be no. And your answer  
22 there should be no because, first, Mr. Foder fell, in his  
23 own words, because his hands were sweaty, right?

24 And even if you believe that third version of the  
25 story told by Mr. Foder, PATH acted reasonably at all times.

1 They inspect the trains, they teach Mr. Foder how to climb  
2 up onto the train, they provide him with safety equipment.

3 As the jury instruction says, PATH is not a  
4 guarantor of Mr. Foder's safety. They do not guarantee at  
5 all times he will be safe. Mr. Widas himself testified that  
6 Mr. Foder has to play a role in his own safety. Mr. Wallace  
7 testified that every PATH employee has to play a role in  
8 their own safety.

9 Now, I submit to you, ladies and gentlemen of the  
10 jury, that you shouldn't reach damages, because your answer  
11 to the first question of whether or not PATH was negligent  
12 should be no.

13 However, if you do reach damages, I think it's  
14 important to discuss what should be included in these  
15 damages.

16 And again, here, I want to remind you, this case  
17 isn't about whether or not Mr. Foder fell, because he did  
18 fall, or whether or not he had three surgeries, because he  
19 did. Right? But as Judge Arleo instructed, your award, if  
20 you choose to give one to Mr. Foder, should not be  
21 influenced by sympathy. Okay? It should be a fair and  
22 reasonable award, nothing else. It should not come into  
23 play whether or not you feel bad for Mr. Foder.

24 And pain and suffering only includes injuries that  
25 can be related to the July 22nd, 2011 fall.

1                   Now, you heard from two doctors in this case,  
2           Dr. Greisberg, who testified for Plaintiff, and Dr. Dennis,  
3           who testified for PATH. But only one of those doctors saw  
4           any MRI films prior to Plaintiff's first surgery. Only one  
5           doctor saw an image of what Mr. Foder's ankle looked like a  
6           little over a month after the accident, and that was not  
7           Dr. Greisberg. That was Dr. Dennis.

8                   And what did Dr. Dennis tell you?

9                   The osteochondritis dissecans, or the  
10          osteochondral lesion, as Dr. Greisberg puts it, pre-existed  
11          Plaintiff's fall on July 22nd, 2011. He gave you the  
12          description of what osteochondritis dissecans means. He  
13          said dissecans is desert, it's a lack of blood, and he said  
14          quite simply it couldn't have formed over that short a  
15          period of time, over that 32-day period from when Mr. Foder  
16          fell to when Mr. Foder had his MRI.

17                  Now, Dr. Greisberg, despite not seeing the MRI,  
18          comes to a different conclusion.

19                  But think about here, think about which doctor had  
20          more information as to what that ankle looked like before  
21          the first surgery.

22                  Now, because Mr. Foder had this condition before  
23          July 22nd, 2011, it could not possibly have been caused by  
24          the fall on July 22nd, 2011.

25                  Now, you did hear in Judge Arleo's instruction

1       about aggravation of a pre-existing condition.

2               Well, ladies and gentlemen of the jury, based on  
3       the testimony of Dr. Dennis, there's simply no way to  
4       actually know whether or not this aggravated the condition,  
5       because Dr. Dennis testified that the proper testing was not  
6       done to differentiate whether or not that pain that  
7       Mr. Foder was feeling in his right ankle after the injury  
8       leading up to the first surgery, whether or not it was due  
9       to the ankle sprain that he did suffer -- he admittedly  
10      suffered a right ankle sprain -- whether it was due to that,  
11      or the osteochondral lesion. Right? There's just no way to  
12      determine what was causing that pain.

13              So here, Plaintiff is asking you to find in his  
14      favor, to find that this pre-existing osteochondral  
15      dissecans was aggravated. But there is not the background  
16      information to come to that point.

17              Now, Plaintiff also discusses some of the things  
18      that he says he suffered as a result of this injury. Right?  
19      And this is, to me, where it's very important to remember  
20      that sympathy should not be a factor.

21              Plaintiff talks about having to move back home.  
22      Plaintiff talks about breaking up with his fiancée, and not  
23      being able to play with his young daughter.

24              Now, ladies and gentlemen of the jury, these are  
25      not happy things. I fully admit these are sad things.

1                   But these are things that are said to play on your  
2           sympathy. Okay?

3                   Resist that urge. All right?

4                   And Mr. Foder also talked about the things he  
5           couldn't do as a result of this injury, right?

6                   You will have the medical records of  
7           Dr. Greisberg, the doctor who did the second two surgeries  
8           for Mr. Foder, the last orthopaedic doctor that Mr. Foder  
9           saw, right? You will not find anywhere in those records  
10          Dr. Greisberg instructing Plaintiff, once he's ready, to not  
11          run, to not be active. In fact, Mr. Foder testified that  
12          Dr. Greisberg told him to jog and use the elliptical  
13          machine.

14                  You will not find a note in those medical records  
15          that tells Mr. Foder not to ride his motorcycle. You will  
16          not find anything in those medical records that tell  
17          Mr. Foder not to play with his daughter, to push her on a  
18          swing, to go run around on the playground with her, nothing  
19          that tells Mr. Foder not to do the things that a good parent  
20          such as Mr. Foder would want to do with his daughter. Okay?

21                  But what did the medical evidence actually show?

22                  We talked about it. A week or so after the  
23          accident, when -- actually, more like two weeks after the  
24          accident, when he goes to the first rehab visit, by August  
25          1st, 2010, the pain in the right ankle is a one out of 10.

1 All right? Six weeks after the first surgery, Mr. Foder  
2 tells his doctor he's feeling pretty well. By the time he  
3 gets to Dr. Greisberg, he fills out an intake form and he  
4 tells Dr. Greisberg he's exercising regularly.

5 And again, six weeks after the second surgery, he  
6 says he's not really feeling much pain, and within a few  
7 months of that second surgery, he's doing the jogging and  
8 the elliptical that Dr. Greisberg suggested.

9 And after the third surgery, which both Dr. Dennis  
10 and Dr. Greisberg agree involves less than the second  
11 surgery, less than two weeks after that, Mr. Foder's feeling  
12 pretty well and putting weight on that foot. All right?

13 And with respect to this last surgery, you heard  
14 Dr. Dennis say that Mr. Foder made a pretty good -- had a  
15 pretty good result. And you heard Dr. Greisberg talk about  
16 the result as well.

17 And how else do we know that it's a pretty good  
18 result?

19 Well, Mr. Foder hasn't seen Dr. Greisberg since  
20 March of 2015. That's more than a year and a half. And  
21 Plaintiff is back to work, full duty, as an engineer for  
22 PATH. Not an easy job physically, but he's back full duty.

23 Now, Plaintiff does claim that he's suffering from  
24 some residual tendinitis in the ankle.

25 Now, one of the instructions Judge Arleo gave you



1 is about the mitigation of damages and how Mr. Foder has a  
2 duty to not make his injury any worse by taking the proper  
3 care to treat his injury.

4 Dr. Greisberg prescribed a foot orthotic for  
5 Mr. Foder, and Dr. Greisberg said not wearing that foot  
6 orthotic can make the tendinitis worse.

7 Well, what did Plaintiff say?

8 Plaintiff said he doesn't wear it around the house  
9 all the time. And Dr. Dennis also testified that Plaintiff  
10 wasn't wearing it when he went to go see him.

11 So we know that Plaintiff not only doesn't wear it  
12 around the house all the time, but he also doesn't always  
13 wear it when he goes outside.

14 So like I said, where are we today with Plaintiff?  
15 Hasn't seen an orthopaedic doctor in over a year and a half,  
16 is back to full duty at PATH. All right?

17 Now, Plaintiff is also asking for some lost  
18 overtime here, saying that he would have made X amount of  
19 dollars in overtime had he not been injured.

20 Well, you heard about overtime, right? You heard  
21 that it's not guaranteed. You heard that it fluctuates.  
22 And you also heard Mr. Foder say that there were times when  
23 he was offered overtime and didn't work it.

24 So, ladies and gentlemen of the jury, I think when  
25 you look back and consider the evidence and the testimony in

1       this case, I think it's relatively straightforward. I think  
2       you look at Defendant's Exhibit A and Defendant's Exhibit B  
3       and see that Mr. Foder fell because his hands are sweaty. I  
4       think it's as simple as that.

5               Words have meaning, right? Make these words  
6       count. These are his words, said hours after the accident.

7               But really, no matter what story you believe,  
8       Mr. Foder was doing something on a job that he had done  
9       hundreds of times, right?

10              But he wasn't paying attention. He didn't pay  
11       attention enough to put the gloves on, right? Especially in  
12       light of his hands being sweaty. Doesn't pay attention  
13       enough to put the gloves on. Doesn't pay attention enough  
14       to notice if there's grease on his shoe or on the  
15       anti-climber or on the end step. Right? And he doesn't pay  
16       attention enough to put his foot securely on the  
17       anti-climber.

18              So based on this, ladies and gentlemen of the  
19       jury, I submit to you that Mr. Foder has not met his burden,  
20       and PATH was not negligent in this case.

21              Thank you.

22              THE COURT: Thank you.

23              Okay. It is now 11:45. Why don't we take like a  
24       10-minute break to use the bathrooms, and then we'll come  
25       back and allow Plaintiff's counsel to sum up. Okay?

1 Thank you.

2 THE COURT CLERK: All rise.

3 THE COURT: If you need 15, that's fine. Ten to  
4 15 minutes.

5 (The jury exits)

6 THE COURT: Okay? All right. See you in 10 to  
7 15.

8 (Recess taken)

9 (Jury out)

10 THE COURT CLERK: All rise.

11 THE COURT: Okay.

12 THE COURT CLERK: All rise.

13 (The jury enters)

14 THE COURT: Okay. Ladies and gentlemen of the  
15 jury, have a seat.

16 And now we will call upon Plaintiff's counsel to  
17 give closing remarks.

18 MR. ROSENTHAL: Thank you, Your Honor.

19 Is it afternoon or is it morning?

20 THE COURT: It's afternoon somewhere and it's  
21 morning somewhere, but it's 12:01 here, so I think we're  
22 good either way.

23 (Laughter)

24 MR. ROSENTHAL: Good afternoon, ladies and  
25 gentlemen.

1                   Let me begin by telling you what this case is not  
2                   about.

3                   This case is not about FRA regulations. We're not  
4                   claiming that there was any FRA regulation that Mr. -- or  
5                   Mr. Foder is not claiming through me that there's any FRA  
6                   regulation that was violated specifically relating to the  
7                   climb system or the grip tape. We're not saying that  
8                   there's a violation of any FRA regulations that are  
9                   applicable to PATH.

10                  What we are saying is that PATH did not provide a  
11                  reasonably safe place to work. And I'm going to explain how  
12                  the evidence shakes out on that very issue. I'm going to go  
13                  through each of the witnesses and explain how this case  
14                  actually plays out.

15                  This, Exhibit 23A, which is in evidence, is the  
16                  front side of a PATH PA-5 car, very similar to the one --  
17                  actually, it is the one that Mr. Foder got injured on.  
18                  Again, it's not the same scenario - there was no steps there  
19                  at the time. He was using the climb system that existed on  
20                  the car.

21                  We heard, first of all, from Mr. Wallace.  
22                  Mr. Wallace tells us that prior to these cars ever getting  
23                  into service, the FRA met with PATH to talk about whether,  
24                  you know, are they in compliance with FRA regulations.  
25                  Again, remember, FRA regulations aren't the case here.

1           Mr. Wallace also tells us that there's part of  
2           this that has nothing to do with FRA regulations - this,  
3           which is the footstool on the right. Nothing to do with the  
4           FRA. The FRA says nothing about that.

5           The climb system, again, having a climb system on  
6           the back of the car - FRA doesn't deal with it at all.

7           That, ladies and gentlemen, is what this case is  
8           about: Whether, when you tell your employees to use a  
9           particular method or system to gain access to a train,  
10          whether you have to make it safe or not, and whether PATH  
11          did that. They knew that people were going to be getting on  
12          and off the trains. They knew it. They put nonstick  
13          material on this, right here, on the footstool. That had  
14          it.

15          July 22nd, 2011. Mr. Foder was doing his job.  
16          He's been working as an engineer for PATH for six months or  
17          so, five months. He is living with his girlfriend, their  
18          new baby. His life is beginning. He's 24 years old. This  
19          is the beginning of his life.

20          It's a hot day. He follows another worker on --  
21          into this area. The other worker, Ms. Bou, gets up on the  
22          train. Mr. Foder follows her.

23          Now, we heard something from just about every  
24          witness about training that PATH uses to train people how to  
25          get on trains, and what do we know from the testimony?

1           We know that Mr. Avril claims that he makes sure  
2           that every engineer is able to get onto the train and that  
3           he instructs them to use a certain method. And what is the  
4           method that he instructs? Put your right foot into the foot  
5           stirrup, grab ahold with your left hand the vertical portion  
6           of the grab bar, your right hand on the horizontal portion  
7           of the hand bar, and then with all the strength that you  
8           can, you pull yourself up and place your right foot directly  
9           -- or, I'm sorry, your left foot directly onto the diamond  
10          plate. That's what he says is the method that he's teaching  
11          to every single engineer.

12           Then he sort of backs away a little bit: Well, if  
13          you have a big foot, it might be okay if you have part of it  
14          on the diamond plate.

15           And, of course, the diamond plate that Mr. Foder  
16          encountered that day looked like that (referring to Exhibit  
17          P-24A) .

18           Now, Mr. Foder testified that at the time of the  
19          incident, having non-slip on the anti-climber existed, but  
20          wasn't prevalent. So some cars had it, some cars didn't.

21           But it's not something that he was entrusted with  
22          inspecting, and in fact, it wasn't even something that  
23          Mr. Velez inspected. You see, when Mr. Velez later is going  
24          to come and look at this piece, he's not looking to see  
25          whether it has slip-resistant tape or not; he's just looking

1 to see if there's any bends or bangs or if it's falling off.  
2 It's pretty much a visual inspection is what he testified  
3 to.

4 Now, Mr. Foder and everybody else except for  
5 Mr. Avril testifies that when they step onto the train,  
6 they're stepping on the edge. Mr. Velez stepped on the edge  
7 when -- when he did the same thing that day, he stepped on  
8 the edge. He testified to that.

9 Mr. Wallace testifies that you have to, you have  
10 to step on the edge as well as the diamond plate. You have  
11 to. You can't do it without it, which is essentially what  
12 Mr. Foder testifies to. It's impossible, it's impossible  
13 not to.

14 Now, the ultimate question, ladies and gentlemen,  
15 that you're going to be asked is whether the whole system  
16 with non-slip tape is or is not reasonably safe. PATH wants  
17 you to believe that they don't have any obligation to  
18 provide for that because the FRA doesn't obligate it. But  
19 again, the FRA isn't what's at issue here. FRA regulations  
20 don't apply to this. This is just about whether or not this  
21 -- telling people to get on the train in that environment  
22 from track level, climbing 49 inches with your left foot, is  
23 safe if you don't have something nonskid.

24 And I'm going to explain a little bit later what  
25 Mr. Widas's testimony was on that issue.

1           PATH acknowledges that they have a moral  
2           obligation to provide a safe place.

3           Well, what does that mean, a moral obligation?

4           They have an obligation under the law to provide a  
5           reasonably safe place to work, period. Not a -- it's not  
6           moral, not just moral - it's an obligation. They have that.  
7           The law as the Judge read it to you says it.

8           PATH's main defense is that Mr. Foder's climbing  
9           up, and his right foot slips, and it has nothing to do with  
10          the non-slip because he didn't write it in his initial  
11          accident report, the accident report that he wrote out two  
12          hours after he was hurt. When he writes, I injured my ankle  
13          when I was essentially climbing onto the train, he was in  
14          pain, excruciating pain, as he testified, and he just wanted  
15          to get out of there. Of course, PATH doesn't let him go  
16          home; they bring him from the hospital to PATH's  
17          headquarters and make him fill out this report, two of them,  
18          and he's writing the exact same thing in both of them.

19          Mr. Mino wants you to believe that this is two  
20          different times telling the same thing. He's telling the  
21          same thing, it's at the same time he's filling out these  
22          reports.

23          Interestingly, PATH's so concerned about Mr. Foder  
24          that they let him under those circumstances drive himself  
25          home with his left foot.



1                   So we have Ms. Bou, who gets on the train  
2 immediately before Mr. Foder. She's not using the right  
3 method to climb up. She has both her hands on the  
4 horizontal.

5                   As a matter of fact, nobody testifies that they  
6 use the method that Mr. Avril claims everybody should be  
7 using. Not a single witness came in here to tell you that.

8                   And, in fact, they never charged Mr. Foder with  
9 violating a rule for failing to get on the train properly.  
10 What they basically were trying to say is that he should  
11 have put gloves on, okay? He should have put his gloves on.  
12 He should have known and put gloves on because -- and you  
13 heard Mr. Avril testify to this -- it is a requirement of  
14 the job, you have to wear gloves at all times. That's --  
15 that's it, period. You have to wear gloves. He wasn't  
16 wearing gloves. It's his fault. That's what Mr. Avril  
17 said.

18                   And when he got on the stand, when Mr. Foder got  
19 on the stand, Mr. Mino went after him: So you're calling  
20 Mr. Avril a liar.

21                   Let's talk about the gloves for a moment.

22                   Gloves. Are they a requirement of the job? You  
23 heard people talk about PATH had a book of rules, this thick  
24 book of rules. It's not in evidence. They didn't put it in  
25 evidence. Don't you think if there was a rule requiring him

1 to wear gloves, that would have been -- he would have been  
2 cross-examined on that, and you would be looking at that  
3 rule to see that he was in violation of that?

4 Nothing.

5 The other thing I want you to understand about the  
6 gloves, ladies and gentlemen, is, when the accident report  
7 is filled out -- this is Defendant's Exhibit A.

8 Question number 15 -- that might be hard to read;  
9 I'll have to -- can people see that?

10 "Was personal protective equipment required for  
11 this job?"

12 This is their exhibit.

13 "Yes."

14 Identify it.

15 "Safety Shoes; Reflective Vest; Flashlight; other,  
16 Escape Head," or that's what it looks like.

17 THE PLAINTIFF: "Hood."

18 MR. ROSENTHAL: There's something here for "Rubber  
19 Gloves, Canvas Gloves, Other Type Gloves."

20 You don't see it circled, do you?

21 There was no requirement for gloves. That's their  
22 defense. They concocted that. Half of this is concocted to  
23 try to make him look like he did something wrong. And you  
24 know what? He didn't deserve it.

25 This isn't just what PATH did to Mr. Foder, ladies

1 and gentlemen. That is what PATH's trying to do to you in  
2 how you evaluate this case.

3 Let's talk about the grounds around where  
4 Mr. Foder got hurt.

5 This is also in evidence. To give you an idea,  
6 this is Exhibit 5T.

7 (Plaintiff's Exhibit 5T was displayed.)

8 MR. ROSENTHAL: And you can see some things in  
9 here that probably shouldn't be there: We have a hairbrush;  
10 we got some sort of trash; there's more cigarette butts in  
11 this photo than I don't think I've ever seen on a street  
12 corner anywhere.

13 Mr. Foder tells us, this is the way it is all the  
14 time. This is the way it is. There's debris, there's oil,  
15 and there's grease.

16 Mr. Mino goes after Mr. Foder because he doesn't  
17 know the exact spot for where the oil and grease were.

18 Why would he? I mean, he's not inspecting for  
19 that. Either is Mr. Velez, for that matter. They're not  
20 inspecting for oil and grease. It's not their jobs. They  
21 don't know exactly where it is. They know it exists in that  
22 area. As Ms. Bou testified and as Mr. Foder testified with  
23 regard to the grease, there's a greaser that goes by that  
24 area all the time spreading grease. She said it gets on  
25 your shoes, it gets everywhere, and so did Mr. Foder.

1           The question of whether or not there were other  
2           things there and why he told the doctor or the PATH Medical  
3           a week later that he thinks maybe he had grease on his foot,  
4           he's trying to figure out what's going on: There's grease  
5           there. Why did I slip? He's trying to figure it out, why  
6           he slipped. Why did he slip?

7           Now, let's talk about safety, because that's  
8           really the issue here is safety.

9           You only heard one witness testify about, what is  
10          safety? What is required? We have steps all over the  
11          place. Here (indicating Exhibit P-23A), we have steps.  
12          What do we need? What makes safe steps, particularly if  
13          we're going to tell people, this is where you've got to get  
14          onto a train. There's no other place to get on; got to get  
15          on here.

16          Now, there's no question about it, ladies and  
17          gentlemen, if they had this thing there with the handholds  
18          here, no problem. They don't. And we're not saying that  
19          they should have.

20          What we're saying is, in essence, that if you're  
21          going to have -- that what makes steps and climbing systems  
22          safe is, you need -- and I can't remember the exact words  
23          that Mr. Widas used, but symmetrical was one of them, and  
24          concentric, I believe, was the other one, which means that  
25          you really need to be -- where the force is coming down, you

1       need to be almost at a perpendicular angle, because when  
2       it's perpendicular, there's no slippage in any direction,  
3       it's straight down, and that's just common sense.

4               When you're asked to pull yourself in a direction,  
5       like this climb system does, you're violating the principles  
6       that safe practice requires for concentric and symmetrical  
7       climbing systems. It becomes eccentric and asymmetrical.

8               Now, even with that being said, if the walking  
9       surface up here that he's getting on had some sort of slip  
10      resistance at that edge, we wouldn't be here. That's what  
11      Mr. Widas said as well. If you're going to ask people to do  
12      this, make the floor safe, like on some of the other trains.  
13      Make it safe. Why isn't it safe on this one?

14              If it had been, we wouldn't be here. And what  
15      happened to Mr. Foder afterwards, none of that would have  
16      happened.

17              So, really, if he is in any way injured in the  
18      process, PATH could have done something to -- should have  
19      done something to make this whole system safe. They did it  
20      on the foot step. They failed to do it here. And you don't  
21      need slip resistance like that. It's concentric and  
22      symmetric. But it wasn't. And you're asking people to use  
23      it every day, and it's foreseeable, ladies and gentlemen,  
24      that at some point there's going to be a problem, and it  
25      might not happen every day. But if it does happen, it's

1       because there's a problem with the system, not because  
2       Mr. Foder wasn't paying attention.

3               Mr. Foder has done that job a lot. Never happened  
4       to him before. Always used the same procedure. He knows  
5       where his foot was.

6               I heard Mr. Mino in his closing say, he can't even  
7       tell you, you know, he can tell you where his foot was, but  
8       he can't tell you what the -- you know, where the oil or  
9       grease were.

10              He knows where his foot is because he does this  
11       every day. He knows where his foot is when he gets up  
12       there. He's only a -- he's six foot, and his foot's going  
13       to be in the same place every time. It's just the way it  
14       is.

15              Ms. Bou's foot is going to be in a different place  
16       because she's a lot smaller.

17              Everybody who does this is going to be affected by  
18       the system differently. It's just a matter of physics. You  
19       don't need the numbers to be able to tell that. It's just  
20       common sense.

21              So we know from Mr. Avril that he supposedly is  
22       teaching everybody to use the same system, and we know that  
23       we don't have one witness that actually is using the proper  
24       system that he's teaching. We know from Mr. Avril that,  
25       supposedly, there is a requirement that everybody's supposed

1 to wear gloves, and we know that that can't be true because  
2 they don't even list it on the accident report as required  
3 PPE, or personal protective equipment.

4 So we know all that now.

5 Mr. Foder falls at some point during this process  
6 of trying to get onto the train using this system without  
7 proper -- without the proper ingredients to make it safe.  
8 We know he injures his ankle, falls to the ground, and bangs  
9 his leg. But whether he actually causes the damage to his  
10 ankle here or here, we can't tell, and neither can  
11 Dr. Greisberg.

12 Mr. Foder goes to the hospital that night. He  
13 goes to PATH Medical. They sent him to Drs. Lombardi and  
14 Patel. They're treating him in the beginning for a sprain.  
15 Now, he has a sprain. There's no question, he's got a  
16 sprain. But there's something else going on, because,  
17 normally, when you have a sprain, it goes away after a  
18 certain period of time. This didn't. Normally, when you  
19 have a sprain, you don't have the same pain that this man  
20 had.

21 Now, I'm going to talk about the doctors that  
22 ultimately do the surgery and Dr. Dennis. I want you to  
23 remember when I go through talking about them two important  
24 facts.

25 Number one is, Dr. Greisberg, Dr. Lombardi,

1 Dr. Patel, Dr. Berberian, Dr. Greisberg, Dr. Whitley,  
2 all these doctors either work for PATH or PATH referred  
3 Mr. Foder to them.

4 Mr. Mino is poking holes in Dr. Greisberg's  
5 opinion, but Dr. Greisberg was the doctor that they hired to  
6 help him.

7 That doesn't make sense.

8 So what did they do? They go out and they get  
9 Dr. Dennis. Dr. Dennis -- Dr. Greisberg testifies that the  
10 first surgery he does is state of the art in 2013 - state of  
11 the art.

12 Dr. Dennis hasn't done a surgery on anybody since  
13 2000, or 2001, possibly. He hasn't seen an ankle. And he's  
14 going to be complaining about the care that Mr. Foder got:  
15 The first surgery, I don't think it was necessary.

16 Well, the doctors that PATH sent Mr. Foder to,  
17 they certainly did, because they did the surgery, not just  
18 once, not just twice, but three times, he had surgery. The  
19 doctors that PATH sent him to, three times, he had surgery.

20 What's the other side of that; that Mr. Foder  
21 wanted to be out of work during that period of time so -- I  
22 mean, I don't understand what the argument is with any of  
23 that. Everything was incidental?

24 Dr. Dennis in his opinions says, I believe that  
25 this incident caused some sort of issue with regard to this



1       dissecans that he's talking about.

2               Now, I'm going to get to that also in a minute,  
3       because Dr. Greisberg talks and explains what that is.  
4       Dr. Greisberg tells us that there is a condition called  
5       osteochondral dissecans, and some people have it when  
6       they're young and adolescent, some people have a propensity  
7       to have that issue. Doesn't really matter. You heard the  
8       Judge talk about you take your Plaintiff as you find them.  
9       If he had that propensity, that's on them. That's not on  
10      him. If he happens to damage his ankle, causing some sort  
11      of problem with his osteochondral cartilage, that's on them,  
12      that's not on him. That's not unrelated.

13              Even Dr. Dennis says it came from this incident.

14              The only thing that he says didn't possibly is the  
15      first surgery, which he says, well, you know, look, they  
16      shouldn't have done this first surgery. But they did. They  
17      weren't working on the sprain, ladies and gentlemen. They  
18      were working on this.

19              And what did they do in that first surgery? They  
20      drilled into his bone. He was off his feet. He didn't  
21      work. He got paid for a short amount of time and then went  
22      back to work. And when, by the end of the time that he was  
23      out for the first surgery, he lost his house, and he and his  
24      girlfriend and his new child moved into the garage of his  
25      parents' house.

1                   Now, being a father is important to Mr. Foder, and  
2                   even Mr. Mino had to admit that, well, he's a good father.  
3                   Well, he is a good father. He didn't grow up with a good  
4                   father himself. He actually grew up without a father,  
5                   essentially. His father was an alcoholic. And so he wanted  
6                   to do everything for his daughter, be with her at all times.  
7                   And so when he's out, he's got a newborn baby, and he can't  
8                   even hold her and walk with her.

9                   Now, I can't imagine what that is. But somebody  
10                  under those circumstances, somebody who, all they want to  
11                  do, all they've ever wanted to do is be the father that they  
12                  never had, I'm going to do that. And that's what he was  
13                  deprived of for that period of time.

14                 And then, because it was too cold in the garage,  
15                 they left. And they left him there, and they moved an hour  
16                 away, and his relationship crumbled.

17                 And he's still in his parents' garage. He's  
18                 working. He has the second surgery.

19                 The second surgery, clearly more intensive than  
20                 anything that he had up until then. They're literally  
21                 cutting into his bone and reattaching it so they can get to  
22                 the area where the problem is. Dr. Greisberg tells us that  
23                 what he sees in there is a really large, over one centimeter  
24                 large defect or portion of bone. It's not -- it's loose,  
25                 but it's a flap, and he says flaps are really bad, too. It

1       can be loose, which this one is, and this is really bad, and  
2       I need to get in there, we need to clean this up and get rid  
3       of it. And he does.

4               And again, Mr. Foder is off his feet. This time  
5       he's on his own, for months. Goes back to work. There's a  
6       lot of -- there was -- and again, I don't understand the  
7       necessity of this, but there was a lot of medical records  
8       from right after the incident, couple of weeks, couple of  
9       months where he says his pain wasn't that bad.

10              Before the surgeries, his pain obviously got a lot  
11       worse, because he had the first surgery. If his pain wasn't  
12       bad, he never would have had the first surgery. So  
13       obviously his pain got worse, and it got worse enough so  
14       that he got the first surgery, and it got worse enough again  
15       after he tried to go back to work after the second surgery,  
16       it got worse enough so that he felt that excruciating pain  
17       again and came back, and he felt the need for a third  
18       surgery.

19              Three surgeries. People don't get surgeries  
20       unless they need the surgeries, and doctors don't tell  
21       people they need surgery, certainly not Dr. Greisberg.  
22       Dr. Greisberg, the doctor that they sent him to, is a  
23       world-class doctor, a specialist in foot and ankles. If I  
24       had a problem, that's where I would go.

25              I give PATH credit for that: They sent him to the

1 best doctor that they could have sent him to at  
2 Columbia-Presbyterian Hospital. Good for them.

3 But then they walk into this courtroom and try to  
4 say that, you know, Dr. Greisberg, he didn't do everything  
5 he should have done; he should have looked at that MRI, his  
6 opinion really has no merit.

7 Dr. Greisberg knows what he's doing. His opinion  
8 has merit. And what does Dr. Greisberg say, the doctor that  
9 PATH hired, what does he say? He says that this was a  
10 traumatically introduced osteochondral defect, traumatically  
11 induced.

12 From what, Doctor?

13 From that day that he fell off the train.

14 This incident -- this injury was caused by that  
15 event. There's no question about it.

16 What's the defense?

17 The defense is, he shouldn't be doing it. He did  
18 something unsafe. It's his fault.

19 It's not always somebody's fault if they get hurt.  
20 It's not always, somebody's not being safe, when they get  
21 hurt, if the system doesn't -- if the system is something  
22 like this and it's not proper to begin with.

23 So, ladies and gentlemen, you're asked to decide  
24 certain questions, the first being whether or not PATH was  
25 negligent, and whether that negligence played any role, even

1 the slightest. This case is being brought under a very  
2 special act of Congress called the Federal Employers'  
3 Liability Act, as Judge Arleo told us. That Act says that  
4 if PATH's negligence plays any part in causing this  
5 incident, if this had any role in causing the injury, PATH  
6 is negligent -- PATH is liable, I should say. Any role.  
7 "This" being the back of the car that he was asked to climb,  
8 the climb system without the proper slip resistance.

9 FRA regs don't matter. And you're going to be  
10 asked whether Mr. Foder was negligent because he wasn't  
11 wearing gloves, because he wasn't being safe, because --  
12 because he got hurt.

13 Mr. Foder's at this point given six years of his  
14 life to PATH. And this is where we are.

15 Now, what are the damages?

16 Seventeen months, he wasn't able to work overtime.  
17 That's the first measure of damages. Mr. Foder told you  
18 that he was working one or two days a month overtime. I had  
19 him calculate what one day a month, what that loss would be,  
20 and he calculated it out, netted it out after taxes, if he  
21 missed one day a month, to \$5,600. If he missed two days,  
22 it would be something like 10,000. But that's the extent of  
23 what his loss is from the overtime.

24 The other portion is a much more significant  
25 portion: Pain and suffering, for the pain, for all the pain

1 and suffering he sustained as a result of this incident.

2 And you heard a lot of testimony about what that pain and  
3 suffering entailed, from the pains that he had when he first  
4 was injured, to the excruciating pains, as he described it,  
5 to the pains that he had throughout the entire process. He  
6 told you about everything that he went through when he lost  
7 his home, his family, and how he went back to work in pain.  
8 They told him it was going to be a year. He went back to  
9 work in six months, and he continued to work until he  
10 couldn't do it anymore, and then he needed surgery. He went  
11 back to Dr. Berberian, who said, you need surgery. He said,  
12 I don't want to get surgery. I don't want to get another  
13 surgery.

14 So PATH sent him to Dr. Greisberg. He has a  
15 second surgery. Again, in pain. The pain has not gone away  
16 in six years. Not once. Not for a single day.

17 And what he's been left with, after the third  
18 surgery, what did Dr. Greisberg tell us? He's got arthritis  
19 in there, bone on bone. Not just a little arthritis; it's  
20 bone on bone in his ankle. This is never going to get any  
21 better. Arthritis doesn't get better. His ankle today is  
22 as good as it's ever going to be and it's only going to get  
23 worse, and even Dr. Dennis has to knowledge that, and even  
24 Dr. Dennis tells us that the arthritis is based on this  
25 incident, and even Dr. Dennis tells us that all three

1       surgeries -- well, maybe not the first, but all three  
2       surgeries resulted from this incident. Dr. Dennis really  
3       doesn't tell us anything of significance.

4               Mr. -- I can't remember his name, the expert for  
5       the Defendant that we saw yesterday for 15 minutes. He  
6       doesn't tell us anything. I don't think he gave us any  
7       information of any relevance in this case, nothing, because  
8       the case isn't about the violation of FRA rules.

9               Ladies and gentlemen, this is Steven Foder's one  
10      and only opportunity to tell his story to a jury. This is  
11      it. There will be no other juries. There will be no other  
12      testimony. What you do today will be final. What you do  
13      today will be forever. What you do today Mr. Foder is going  
14      to have to live with for the rest of his life.

15              We all can leave here and move on in our lives,  
16      forgetting about what goes on today, forgetting about this  
17      past week, all of us. Me, too.

18              But not Steven Foder. He will go on for the rest  
19      of his life in the condition that he was left in because of  
20      this injury, because of what PATH allowed the condition to  
21      be for him to climb that day.

22              Some cars had it, some didn't.

23              Why not this one?

24              Thank you.

25              THE COURT: Anything further?

1 MR. MINO: No.

2 THE COURT: Mr. Rosenthal, are you good?

3 MR. ROSENTHAL: I'm good. Thank you, Your Honor.

4 THE COURT: Okay. Thank you.

5 All right. Ladies and gentlemen of the jury, this  
6 is now your turn to deliberate. It is always good timing  
7 when it's right around lunchtime. So Amy has taken care of  
8 your lunch.

9 I am going to send you into the jury room. We're  
10 going to send in a copy of the written instructions that I  
11 read to you so you can use that as a reference, as well as  
12 the verdict sheet, and Amy will then bring in to you or have  
13 the CSO, the Court Security Officer bring in the exhibits.  
14 Okay?

15 So, with that, be mindful of the instructions that  
16 I gave earlier. Please take this seriously.

17 I can tell, and I want to thank you before you  
18 deliberate for the great attention that you've all shown  
19 during this trial. All jurors are not created equal, and  
20 this has been an extraordinarily attentive and respectful  
21 jury, and for that, I am grateful.

22 So with that, I will send you into the jury room,  
23 and please begin to deliberate in accordance with my  
24 instructions.

25 Thank you.



1 Yes?

2 Okay. We have to swear in the CSO, our Court  
3 Security Officer, who will stand guard and protect the jury  
4 during the deliberations.

5 THE COURT CLERK: Raise your right hand, place  
6 your left hand on the bible, please.

7 R O B E R T L I P I N S K I, Court Security Officer, was  
8 duly sworn.

9 THE COURT CLERK: Please state your full name for  
10 the record.

11 SCO LIPINSKI: Robert Lipinski, L-i-p-i-n-s-k-i.

12 THE COURT CLERK: All rise.

13 (The jury retired at 12:41 p.m.)

14 THE COURT: All right. Guys, does Amy have your  
15 cell phones?

16 MR. ROSENTHAL: I'm here. I'm not going anywhere.

17 THE COURT: Okay. If you want to run to the men's  
18 room or something --

19 MR. ROSENTHAL: I can give her my cell phone  
20 number.

21 THE COURT: You don't have to. If you're going to  
22 stay here, that's fine, but if you want to get a bite to  
23 eat, there's a coffee shop in the basement, you know, if  
24 you're going to leave, like, the hallway or here, just leave  
25 Amy your cell phone number.

1 MR. ROSENTHAL: Thank you, Your Honor.

2 MR. MINO: Thank you, Your Honor.

3 THE COURT: And if there are any questions, I'll  
4 have her call you.

5 (Matter recessed)

6 (Jury out)

7 THE COURT CLERK: All rise.

8 THE COURT: All right. Juror note one -- we've  
9 got a note, Jury Communication Number 1. Amy has given the  
10 lawyers copies of the note, and I'll read it for the record.

11 It says: "Is there an exhibit that can show us  
12 where the train was located when the accident occurred?  
13 Please specify the exhibit number."

14 Signed by the foreperson.

15 I will tell you what my immediate reaction is, is  
16 that I don't think it would be appropriate to at this point  
17 direct them to any one exhibit, because that would be  
18 supplementing the record.

19 When the exhibits were entered, they were moved  
20 into evidence in front of the jury. If counsel didn't  
21 explain any of them, it's up for them to discern what they  
22 are. It's not for me to tell them, oh, yes, Exhibit 6 is  
23 where it might have been, or close to where it was, because  
24 then I would be commenting on evidence beyond the record.

25 So I don't think I can answer this question, other

1       than to tell them that they need to rely on their own  
2       recollection of what the witnesses said about the exhibits  
3       when they were entered into evidence.

4               What do you --

5               MR. MINO: I agree with that. I think -- and even  
6       using the photographs, there was never a specific  
7       identification of, this photo is where the train was, or  
8       anything like that.

9               THE COURT: Right. I mean, sometimes in court you  
10      have a witness with a series of exhibits, and you say,  
11      What's Exhibit 1? And they say, Oh, this is what it looked  
12      like before Hurricane Sandy hit. This was my house. What's  
13      Exhibit 2? This was the morning after the hurricane.  
14      What's Exhibit 3? Six months later. And the witness will  
15      describe it so you could then read back that portion of the  
16      record to the witness.

17              I don't remember with any kind of specificity  
18      about the pictures.

19              I think there were -- how many pictures were  
20      entered into evidence?

21              MR. ROSENTHAL: Probably about 45.

22              THE COURT: Forty-five, and are they all of  
23      trains, or --

24              MR. ROSENTHAL: No, there's probably about -- my  
25      guess is about 30 are of S track and that about 15 are of

1 the car -- the train at a different location.

2 THE COURT: And they were all your exhibits,  
3 Mr. Rosenthal?

4 MR. ROSENTHAL: Yes. Yes.

5 THE COURT: Okay. And when you entered them --  
6 the one that was blown up on the easel we used a lot. I  
7 don't recall you really talking -- you moved them in, and I  
8 don't think there was a lot of discussion about them.

9 MR. ROSENTHAL: I think at one point I talked  
10 about the one being at -- not in the location it was at the  
11 time.

12 MR. MINO: The blowup.

13 MR. ROSENTHAL: The blowup.

14 MR. MINO: Yes, that was it, but there was no  
15 discussion as to the ones that show S track, track area,  
16 where, like which -- Mr. Foder or no one else testified,  
17 This is where the train was that day.

18 THE COURT: Right. But I don't think I can say  
19 that.

20 MR. MINO: Right, I don't either. I think that's  
21 why you shouldn't, because there wasn't testimony to that.

22 THE COURT: Okay. So let's prepare a response.

23 We can do it on this note, or I can call them back  
24 in and tell them orally.

25 MR. ROSENTHAL: Why don't you do it on the note?

1 THE COURT: So let's formulate an answer:

2 The Court can only answer your question by  
3 referring you to the exhibits and the testimony, if any --  
4 the exhibits themselves, and the testimony, if any, of  
5 witnesses about a particular exhibit.

6 MR. ROSENTHAL: I mean, I think it's also fairly  
7 clear that the incident happened on S track.

8 THE COURT: I can't say that, though, because  
9 that's not the question.

10 MR. ROSENTHAL: Okay.

11 THE COURT: "Is there an exhibit that can show us  
12 where the train was located when the accident occurred?"

13 MR. ROSENTHAL: Okay.

14 THE COURT: I was going to propose: The Court can  
15 only answer your question by referring you to the exhibits  
16 themselves and the testimony, if any, of witnesses about a  
17 particular exhibit.

18 MR. ROSENTHAL: Well, the accident report does  
19 reference where it happened.

20 MR. MINO: Yes, but there's no testimony tying the  
21 accident report to the photos. Where within the photos?

22 MR. ROSENTHAL: It's not about the photos.

23 THE COURT: It doesn't say about photos, it says  
24 "exhibit."

25 MR. MINO: Oh, "exhibit." Then, yes, you can

1 say --

2 MR. ROSENTHAL: It's in Exhibit -- I think it's A?

3 MR. MINO: A is the accident report, yes.

4 THE COURT: The exhibits, including the accident  
5 report?

6 MR. ROSENTHAL: Oh, and Velez's memo, Exhibit --  
7 What is Velez's memo?

8 MR. MINO: His memo to Avril? It's C.

9 THE COURT: My sense from this note is, they don't  
10 want --

11 MR. MINO: Yes, They want a picture.

12 THE COURT: They want a picture, my sense is, but  
13 that's what they ask.

14 MR. MINO: Right.

15 THE COURT: Including the accident report, which  
16 is -- what's the number of that one?

17 MR. MINO: Defendant's Exhibit A.

18 THE COURT: Defendant A. And anything else?

19 MR. MINO: I think B does as well, the Unusual  
20 Occurrence mentions S track?

21 MR. ROSENTHAL: B and C.

22 MR. MINO: A, B, and C.

23 C is the memo from Lupia to Avril.

24 THE COURT: My sense is, I'm not sure if I'm  
25 comfortable referring them to a particular exhibit, one over

1       the other.

2               MR. ROSENTHAL:   Okay.

3               THE COURT:   I think the better answer is, The  
4       Court can only answer your question by directing you to each  
5       exhibit --

6               MR. ROSENTHAL:   And your recollection of the  
7       testimony.

8               THE COURT:   -- and your recollection of the  
9       testimony for each exhibit.

10              MR. ROSENTHAL:   Or the testimony, testimony.

11              THE COURT:   Of the testimony, if any, about a  
12       particular exhibit.

13              MR. ROSENTHAL:   Okay.

14              THE COURT:   "The Court can only answer your  
15       question by directing you to each exhibit and your  
16       recollection of the testimony, if any, about a particular  
17       exhibit."

18              Does that work?

19              MR. ROSENTHAL:   That's fine.

20              MR. MINO:   Yes.

21              THE COURT:   Okay.

22              So I'm going to have someone with neat handwriting  
23       -- which would be Amy --

24              (Laughter)

25              THE COURT:   We don't have a typewriter, do we?

1 THE COURT CLERK: No.

2 MR. ROSENTHAL: Do they still make typewriters?

3 THE COURT: I have one --

4 (Laughter)

5 THE COURT: -- but it's home.

6 "The Court can only answer your question -- " --

7 I have an I.B.M. Selectric.

8 -- " -- directing you to each exhibit..."

9 Okay. I'll read it back again. I'll have Amy  
10 write it out, and then you can look at it before I send it  
11 back.

12 "The Court can only answer your question by  
13 directing you to each exhibit and your recollection of the  
14 testimony, if any, about a particular exhibit."

15 MR. MINO: Yes. That's fine.

16 MR. ROSENTHAL: Yes, that's fine.

17 THE COURT: Okay.

18 Amy will write it, show it to me, then show it to  
19 you, and then send it in to the jury. Okay?

20 Thank you.

21 (Matter recessed)

22 (Jury out)

23 THE COURT CLERK: All rise.

24 THE COURT: Okay, everyone. At 2:55 p.m., I  
25 received Jury Communication Number 2 that states that "The



1 jury has come to a unanimous verdict." Okay?

2 So we're going to call the jury in. I will ask  
3 them to pass me up the note, and then we'll read the  
4 questions together, and if you want me to poll the jury,  
5 just ask me, and we'll poll the jury.

6 THE COURT CLERK: All rise.

7 (The jury returned to the courtroom at 3:10 p.m.)

8 THE COURT: I understand that the jury has reached  
9 a unanimous verdict

10 THE FOREPERSON: Yes, we have.

11 THE COURT: Okay. Could the foreman kindly pass  
12 the verdict sheet up to me, and I'll look at it and I will  
13 give it back to you, and then Amy will read the questions  
14 and you can read the answers.

15 Okay. I'm going to ask the foreperson to also  
16 sign and date the verdict when I give it back to you, okay?

17 THE FOREPERSON: Okay.

18 (The verdict was returned to foreperson.)

19 THE COURT CLERK: Just sign here, and just date  
20 it. Okay. And then you just hold on to that.

21 THE COURT: Okay. If the foreperson can rise.

22 Amy is going to read the questions, starting with  
23 Question 1.

24 THE COURT CLERK: "Question Number 1: Do you find  
25 that Defendant PATH was negligent and that Defendant PATH's

1 negligence caused or contributed, in whole or in part, to  
2 Plaintiff Steven Foder's injuries?"

3 THE FOREPERSON: The answer is no.

4 THE COURT: Okay. Thank you.

5 Anything further?

6 MR. ROSENTHAL: Poll the jury, please?

7 THE COURT: Okay. I'm going to ask each of the  
8 jurors the question, Is that your verdict, and was that  
9 verdict unanimous?

10 THE COURT: Juror Number 2.

11 JUROR NO. 2: Yes.

12 THE COURT: Juror Number 3.

13 JUROR NO. 3: Yes.

14 THE COURT: Juror Number 4.

15 JUROR NO. 4: Yes.

16 THE COURT: Juror Number 5.

17 JUROR NO. 5: Yes.

18 THE COURT: Juror Number 6.

19 JUROR NO. 6: Yes.

20 THE COURT: Juror Number 7.

21 JUROR NO. 7: Yes.

22 THE COURT: Juror Number 8.

23 JUROR NO. 8: Yes.

24 THE COURT: Okay. Thank you. The jury is now  
25 officially discharged.

1                   Thank you for your service to the Court. Thank  
2                   you for your patience. Thank you for taking time out of  
3                   your busy schedules to serve the Court.

4                   If you will return to the jury room, Amy will give  
5                   you your phones, and then she also has for you a certificate  
6                   of appreciation on behalf of the Federal Courts for your  
7                   jury service. Okay?

8                   Have a great weekend, and come back anytime if you  
9                   ever want to watch a trial here in Newark. You did an  
10                  outstanding job by your attentiveness and your care, and we  
11                  appreciate it, and thank you for your service to our Federal  
12                  Court. Thank you.

13                  Okay.

14                  THE COURT CLERK: All rise.

15                  (The jury was discharged and left the courtroom.)

16                  THE COURT: Okay. Thank you, everyone.

17                  (Matter concluded)

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